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REPORTS

OF

515

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING

THE JUNE TERM, 1853.

BY THE JUDGES.

40583

VOL. XXIII.

MONTGOMERY, ALA:
PRINTED BY J. H. & T. F. MARTIN.
1854.

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THE JUDGES OF THE SUPREME COURT,
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Middle District of Alabama.

OFFICERS OF THE SUPREME COURT,

DURING THE TIME OF THESE DECISIONS.

Hon. WM. P. CHILTON, Chief Justice.

Hon. DAVID G. LIGON,
Hon. GEORGE GOLDTHWAITE,
Hon. JOHN D. PHELAN,
Hon. LYMAN GIBBONS,
} Associate Justices.

MARION A. BALDWIN, Attorney General.
THOMAS S. MAYS, Clerk.

RULES OF PRACTICE
IN THE SUPREME COURT,
ADOPTED AT JANUARY TERM, 1854.

"It is ordered by the Court, that the following be established as additional Rules of Practice in the Supreme Court of Alabama, to take effect upon and after the first day of the next term of said Court, to be held on the first Monday in June, 1854:

"Rule 30. The counsel for the appellant or plaintiff in error, in each case, shall furnish to each of the Judges of said Court a brief containing a statement of the points to be decided by the Court, and the facts of the case so far as is necessary to shew the manner in which these points arise; and the counsel for the appellee or defendant in error shall, in like manner, furnish briefs setting forth the points of his defence. All briefs must be furnished to the Judges at least one day before the argument of the cause, and any counsel failing to furnish briefs as aforesaid shall not be heard in argument at the bar. Rule 16, on page 711 of the Code of Alabama, is hereby superseded.

"Rule 31. When the death of a party has been suggested, and an order made to revive in the name of or against the heirs or personal representative of the deceased, and this is not done by the next term of the court, the suit shall abate."

RULES OF PRACTICE

ADOPTED AT JUNE TERM, 1853.

"It is ordered by the Judges of this Court, that the following Rules of Practice in the Chancery Courts, in addition to those now in force, be, and the same are hereby, adopted, to take effect on the first Monday in September, 1853, viz:

"Rule 1. The Chancellor shall have power to direct the sessions of the Register or Master in Chancery to be held at such places as he may deem proper.

"Rule 2. Reports of the Register, read in open court on one day, may be confirmed the next, unless excepted to, and when that is the case, the exceptions can be heard and determined without further postponement; *provided*, the Chancellor shall have power to extend the time for excepting to Reports, as also for hearing exceptions, to such day as he may deem proper; *provided* also, that this Rule shall not extend to Reports where the parties having the right to except are in contempt of the court, or have not submitted to its jurisdiction, but as against such parties the Reports may be confirmed upon the reading.

"Rule 3. In all cases, where by the English Orders of Practice two days notice is required, one day shall be deemed sufficient, unless the Chancellor shall otherwise direct.

RULES OF PRACTICE

ADOPTED AT JUNE TERM, 1853.

"It is ordered that the following be added to the Rules of Practice for Inferior Courts, to take effect on the first Monday in September, 1853:

"The Judges of the several Courts, in which Bills of Exceptions may by law be taken, may require such Bills to be presented for their signature during the trial. If no such requisition be made, then such bills must be presented within five days thereafter, unless the presiding Judge shall, in his discretion, give a longer period; but in no case shall a Bill be signed after the final adjournment of the Court, unless the party tendering it has brought himself within the provisions of section 2358 of the Code."

TRIBUTE OF RESPECT TO THE MEMORY OF THOMAS S. MAYS.

SUPREME COURT, FEBRUARY 6, 1854.

ON the assembling of the Court this morning, NATHAN HARRIS, Esq., presented and read to the Court the following resolutions, which had been adopted at a meeting of the Bar on the occasion of the death of the late THOMAS S. MAYS, and requested that they might be spread upon the minutes of the Court:

"*Resolved*, That the members of the Supreme Court Bar have heard with profound sorrow of the death of their esteemed brother, THOMAS SUMTER MAYS, late Clerk of this Court.

"*Resolved*, That he was endeared to us by the purity of his character and his exemplary discharge of all the duties of life, whether personal or official.

"*Resolved*, That, out of respect to his memory, the members of this Bar will attend his funeral, and will wear the usual badge of mourning for thirty days.

"*Resolved*, That the chairman of this meeting be requested to present to the Supreme Court, now in session, a copy of these resolutions, with a request that they be spread upon the minutes of the Court; and that the secretary of this meeting be requested to enclose a copy of the same, together with the proceedings of the Supreme Court thereon, to the family of the deceased.

"*Resolved*, That these proceedings, together with those of the Supreme Court, be handed to the city papers for publication."

To which the CHIEF JUSTICE responded as follows:

GENTLEMEN OF THE BAR: The sudden and unexpected death of our esteemed friend and brother, THOMAS S. MAYS, late the Clerk of this Court, has occasioned feelings of sorrow and regret too deep for utterance.

But a few days since he was in our midst, apparently full of health, and buoyant with hope, actively engaged in the discharge of his duties. Now he sleeps in the silence of the grave, and we shall see him no more until we meet him in the spirit land.

By his death, you, gentlemen, have lost a professional bro-

ther, whose talents, as well as his social and moral virtues, endeared him to you and to all who knew him; this Court has lost a faithful and efficient officer, and the community a highly valued and useful citizen. But, while we deplore his untimely death, who can picture the gloom and sorrow which must fall most heavily upon his family, thus unexpectedly deprived of a husband, father and friend? They share our heart-felt sympathy; and we sincerely trust that the unseen hand which has afflicted them may administer consolation.

Let us, my brothers, improve this visitation of Providence, which admonishes us that Death is in our midst, and that we know not the hour when we too shall be locked in his cold embrace. Let us so live, that when the summons for our departure does come, we may be soothed and sustained by the same hope which animated our deceased brother, and which deprives death of all its terrors.

The resolutions which you have adopted, are ordered to be spread upon the minutes, and this Court will stand adjourned until to-morrow morning, at ten o'clock.

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J. C. Compton

REPORTS

OF

CASES ARGUED AND DETERMINED

At June Term, 1853.

HOLMES *vs.* THE STATE.

1. A charge which has the effect of withdrawing from the consideration of the jury any evidence which tends to establish the plaintiff's case or the defence, is erroneous.
2. However correctly the judge may lay down the law in his general charge to the jury, yet, if, in a subsequent specific charge, he places the case upon the existence of certain facts on which alone it may not be properly made to turn, the effect of which, if literally followed by the jury, is to withdraw from them the consideration of other facts which tend either to disprove or materially qualify those on which the charge is predicated, injury will be presumed from the error.
3. If one has reasonable apprehension of great personal violence, involving imminent peril to life or limb, he has the right to protect himself even at the expense of his assailant's life, if such protection cannot be otherwise secured.

ERROR to the Circuit Court of Montgomery.
Tried before the Hon. JOHN GILL SHORTER.

THE plaintiff in error, William J. Holmes, was indicted for an assault and battery on one Anderson, and was convicted. A bill of exceptions was sealed on the trial by the presiding judge, the material parts of which are as follows:

"The State introduced one Murrah as a witness, who testified, that, on a day in April, 1852, his wife informed him, on his return home early in the morning of that day, that the de

fendant had, during the absence of witness, used very abusive language towards her; that the witness shortly afterwards, and on the same day, took his gun, and walked around his field to a road within less than half a mile of defendant's house; that on his getting to said road, he met with said Anderson and his wife; that he, then and there, told Anderson that defendant had been abusing the wife of witness, and that his (witness') gun was loaded with buck-shot, and that he intended to kill the defendant before sun-down of that day; that, in a few minutes after this, and while witness and Anderson and his wife were still talking together in said road, they discovered the defendant, coming towards them along said road, with his gun; that as soon as they thus discovered defendant, Anderson's wife said to her husband, 'Come, let us go along home, for as soon as Holmes gets here, there will be a fuss;' Anderson answered his wife by telling her to go along home, but that he was not going to run away because there was going to be a fuss; that the defendant was some distance off when these remarks passed between Anderson and his wife; that he continued to walk towards them along said road, in an ordinary walk, and Anderson's wife started for home, and got some distance before defendant came to the place on said road where said witness and Anderson were; that when the defendant got to where they were, witness was sitting on the top of the fence, and his gun, loaded with buck-shot, was standing near him in the lock of the fence; that Anderson was sitting on a stump on the road-side, near to the witness, and had a large knife open in his hand, whitting a stick with it; that when the defendant got to where they were thus situated, he said to them, 'Good morning, gentlemen,' in a courteous and civil manner, and continued to walk on in said road in his ordinary gait until he had passed by them, and that just as defendant thus passsed by where the witness was sitting on the fence, witness said to him, 'What have you been abusing my wife for this morning?' that thereupon angry words passed between witness and defendant, which were not recollected distinctly by the witness; whereupon the defendant said to witness, 'You have not Anderson and your damned clan around you now, and I can whip you in a fair fight: I will give you a fair fight now;' and on making this remark, defendant immediately set down his gun by a tree on the road-side, and also threw down his knife by the

same tree, and took his position in the road, some ten feet from said tree, towards the witness, but some ten feet from Anderson and witness; as soon as defendant made the remark, Anderson said to defendant, 'You have been cursing me behind my back; you shall not curse me to my face. I will cut your damned head off,' and immediately rose from said stump where he had been sitting, with his said large knife open in his right hand, and advanced towards defendant. Defendant here said, 'If you intend to use your knife, I will get my gun and shoot you.' Anderson replied, 'If you are afraid of my knife, I will shut it up,' and did shut it up by pushing the blade against his right side, and threw it down on the ground. The defendant then sprang to his gun, and seized it, and fired; but Anderson was near enough, when defendant seized his gun and raised it, to catch hold of the barrel, and did catch hold of it, and prevent it from doing him any other harm than slightly burning his clothes with the powder. Defendant's gun was a double barreled gun; the said road was a neighborhood road, and the road used and traveled by defendant in going to and returning from his house.

The witness further testified, that, some three months before said difficulty, defendant and one Bowen, who was very stout and weighed one hundred and eighty pounds, were quarreling; that said Anderson came up, and took sides with said Bowen in the quarrel; that said Bowen dared defendant to lay down his sword, but defendant refused, and said that, if defendant would go to some place where they were by themselves, he would fight him a fair fight; whereupon Anderson said, 'Damn his (defendant's) weapons; he can't whip anybody where I am, even with weapons;' that this quarrel oocurred on the road, when defendant was going to a militia muster in the neighborhood, and had on his sword as part of his uniform; that said Bowen, witness and Anderson were severally larger and abler men than defendant; that defendant, witness and Anderson resided in the same neighborhood, not far apart, and all the foregoing matters occurred in Montgomery County.

The State introduced two other witnesses, viz: said Anderson and a Miss Jackson, whose testimony was substantially the same with the foregoing testimony of Murrah. The witness Anderson stated, that, when he saw defendant spring to his gun, he sprang to seize the barrel to prevent his shooting him. An-

derson and Murrah both testified that they were excited, and unfriendly to defendant; and Miss Jackson testified, that before the difficulty she lived with defendant, but since she had lived several months with Murrah, and came here with Anderson; but that she did not live with either Anderson or Murrah at this time.

The defendant introduced Mrs. Rouse as a witness, who testified, that she lived near the place where the said difficulty occurred, for which defendant is indicted; that she happened to be passing the road just before Anderson rose from said stump, and commenced advancing on the defendant with his said knife open in his right hand; that she was within a few feet of Anderson, and near enough to see and hear all that was said or done by Anderson after he arose from the stump; that she did not see him shut his knife, nor did she hear him say to defendant, 'If you are afraid of my cutting you with the knife, I will shut it up,' or anything like that; that she did hear Anderson, as he rose from said stump, say to defendant, 'You shall not curse me to my face. I will cut your damned head off,' and that whilst he was saying this he was advancing on defendant; that she did not know that Anderson had dropped or shut his knife until after defendant had fired his gun, when she saw the knife lying on the ground, shut, near to where the gun fired; that as Anderson was advancing on defendant, and when very near to him, defendant said, 'If you intend to cut me, I will shoot you,' or something like that, and instantly sprang to his gun, and seized and fired it; that said Anderson catching the barrel just before it fired; that she is a cousin of defendant.

The foregoing is substantially all the evidence adduced on the trial of this cause; and upon this evidence the court gave to the jury the following several charges, to-wit:

1. That, if the defendant fired his gun at Anderson in Montgomery County, in April, 1852, and if there was no necessity for such firing, to save his own life, or to prevent great bodily harm from being done to him, nor any reasonable belief of such necessity, then defendant was guilty, as charged in the indictment; but, if the defendant fired his gun under such necessity, or under a reasonable belief of such necessity, then he was not guilty. To this charge no exception was taken.

2. That, if, when Anderson was advancing towards defendant

with his knife open in his hand, defendant said to him, 'If you intend to use your knife, I will get my gun and shoot you,' and Anderson replied, 'If you are afraid of my knife, I will shut it up,' and did shut up his knife, and throw it down on the ground, and defendant then sprang to his gun, and seized it and fired, then defendant is guilty;" to which charge the defendant, by his counsel, excepted.

Belser & Rice, for plaintiff in error:

1. Although there may be no actual danger of such bodily harm as might endanger life, yet, "a reasonable apprehension of great violence to his person, is a sufficient excuse" for the defendant.—Young v. The State, 11 Humph. R. 200; Oliver v. The State, 17 Ala. R. Such is the law, even when the defendant is not altogether free from blame, but the necessity, or the reasonable belief of necessity, may be said to be partly induced by his own act. See "excusable homicide" defined in Roscoe's Crim. Ev. 580.

2. Whether such reasonable apprehension existed, is a question of fact, which the jury alone can decide; and it is error to withdraw it from their determination: See cases above cited. The last charge deprived defendant of all benefit of trial by jury as to the most material matters in evidence.

3. Under the facts and circumstances proved in this case, it is not a conclusion of law, as assumed in the last charge, that the defendant was guilty under the state of facts therein supposed. The defendant, like the witness Rouse, may not have heard what Anderson said about shutting his knife, and may not have known that it was shut or thrown down until after he fired. But, even if defendant did hear what Anderson said, and saw him shut and throw down his knife, still it was a question of fact for the jury to decide, whether or not, under all the circumstances, there was a reasonable appprehension on his part of great violence to his person, even after Anderson had shut and thrown down his knife. The evidence set out in the bill of exceptions discloses a state of facts under which the defendant had reasonable grounds for apprehending great violence to his person; and if he had reasonable grounds for such belief, it is a good legal excuse for shooting, although, in fact, the belief was

erroneous. Such belief is, in law, equivalent to an actual necessity.

4. The last charge deprived the defendant of all the benefit of the first charge. It must have misled the jury in the undue and decisive importance it attached to the shutting of the knife with the accompanying remark of Anderson.—Young v. The State, 11 Humph. R. 200.

5. The last charge is liable to this further objection: it assumes that the defendant had no reasonable apprehension of great violence to his person, *provided* Anderson shut and threw down his knife, and made a certain remark; whereas those facts do not warrant any such assumption. The charge also violates the rule, that, where a charge misleads the jury, by inducing them to believe there is but one point of defence, when there are two, there must be a reversal of the judgement.—Relf. v. Rapp, 3 Watts & Serg. 21; Edgar v. McArn, at June term, 1853.

P. T. Sayre, for the Attorney General, *contra:*

1. Under the testimony in the case, the last charge is correct. The court had a right to charge the jury hypothetically, and upon an assumed state of facts to charge the law by which they would be governed.—Brandon v. Snow *et al.* 2 Stew. 258; State v. Brinyea, 5 Ala. 244; Winston v. Metcalf, 6 ib. 756; Ivey v. Phifer, 11 ib. 540; State v. Cameron, 15 ib. 383.

2. This is all that was done in this case. No single fact is assumed as proved, and no fact is withdrawn from the consideration of the jury. If the facts supposed were proved, there can be no doubt as to the correctness of the charge. The charge given must be construed in reference to the evidence to which it is applied.—Berry v. Hardeman, 12 Ala. R. 604; Lockwood v. Nelson, 16 ib. 294. The evidence in the case, if it proves any thing, proves precisely the state of facts supposed in the charge. There is nothing in the evidence upon which to predicate a charge about "reasonable apprehension." The proof conclusively shows, that there were no facts or circumstances from which the defendant could infer that he was in danger of great bodily harm; nor is there any evidence to show that such an impression was produced on his mind. There is no proof of any conspiracy or concert between Anderson and Murrah; on the contrary, their meeting was accidental. The testimony of

Mrs. Rouse amounts to nothing, as she says she heard nothing; and besides, she is shown to be defendant's cousin. A charge, then, about "reasonable apprehension," would have been abstract, and unauthorized by the testimony.

3. If the charge was legally correct, an objection that it was too general, cannot be sustained; the defendant should have asked a more specific charge.—Hodges v. Branch Bank, 13 Ala. R. 455; Cameron v. The State, 15 ib. 385.

4. The whole charge must be taken together; and thus taken, the defendant had the full benefit of every defence upon which he now insists. The first charge is very full, and covers every point of objection now made. The two charges, though numbered separately, constitute in fact but one charge, and, viewed in this light, it is not obnoxious to any of the objections now made.

5. The first charge ought not to have been given, there being no evidence on which to predicate it. The defendant, then, has had the benefit of all the law on which he now insists, when he had no right to it.—Prichett v. The State, at January term, 1853.

CHILTON, C. J.—There is no principle better settled by numerous decisions of this court, than that the court cannot properly withdraw from the consideration of the jury any evidence which tends to establish the plaintiff's case, or the defendant's defence; and any charge which has this effect upon a fair construction of it, is erroneous. The rule is further settled, that when the record shows that an error has been committed against a party, injury will be presumed, unless the record clearly shows that no injury resulted to him; and, as a further exposition of this latter rule, we may venture to assert, that however correctly the judge in his general charges to the jury may lay down the law, yet, if in a subsequent specific charge, he places the case upon the existence of certain facts on which alone it may not be properly made to turn, and the effect of which, if literally followed by the jury, is to withdraw from them the consideration of other facts which either tend to disprove or materially to qualify those on which the charge is predicated, we must intend injury from this error, since it is impossible for this court to determine what effect such charge had upon the finding of the jury. They might have construed the

charge given in connection with the other charges, and thus have found all the facts necessary to make out the case; on the other hand, they may have confined their investigation to the facts mentioned in the last charge, and have predicated their verdict upon them alone, in which event they have not passed upon the *whole case*, and hence injury results to the party against whom they find.

It is thus manifest that the record leaves the matter in doubt as to whether or not injury has resulted; and being left doubtful, it falls within the principle which reverses for the error.

We come, then, to inquire whether the last charge given by the court was erroneous.

This charge substantially informs the jury, that, "if they find that when Anderson was advancing towards the defendant, with his knife open in his hand, the defendant said to him, 'If you intend to use your knife, I will get my gun and shoot you,' and Anderson replied, 'If you are afraid of my knife, I will shut it up,' and did shut up his knife and throw it down on the ground, and the defendant then sprang to his gun, and seized it and fired, the defendant is guilty."

The defence mainly relied upon was, that the accused, from the circumstances in proof, had, at the time he fired his gun, reasonable apprehension of great personal violence, involving imminent peril to life or limb. If he had, it is clear from all the cases, he had the right to protect himself even at the expense of the life of his assailant, if such protection could not be otherwise secured.—Oliver v. The State, 17 Ala. 598; Pritchett v. The State, 22 ib. 39, and cases cited.

It is not our province to say whether, in the case before us, the evidence sustains such defence. It is sufficient for the purposes of this investigation, that there was some evidence *tending* to establish it.

It was a question peculiarly for the jury to decide, whether the defence was made out; and as the facts set forth in the charge, and upon which, as matter of law, the court deduced the defendant's guilt, were not wholly inconsistent with the opposite hypothesis which other facts tended, however feebly, to establish, it follows that the charge, which must be construed with reference to the facts, was erroneous. We cannot judicially know that the prisoner heard what Anderson said, or saw what

he did. There was one witness, who was present, and who testifies that she did not hear him say any thing about his knife, nor did she see him throw it down. Whether the prisoner saw or heard him, or whether, seeing and hearing him, he notwithstanding had reasonable apprehension that he was in imminent peril of great bodily harm, are questions which the jury should determine from all the facts and circumstances in proof. But the jury might well have supposed that, if they found the truth of the facts hypothetically stated in the last charge, these inquiries were superseded.

In Pritchett v. Monroe, 22 Ala. 501, we held that a charge based upon a hypothetical state of facts, which excludes from the consideration of the jury other evidence which is before them, is erroneous, as tending to mislead the jury by creating the impression that they would be authorized to reject the other evidence. The same principle was re-asserted in Edgar v. McArn, at this term. Such, we think, is the effect of this charge.

Let the judgment be reversed, and the cause remanded.

Ex Parte REMSON.

1. An order of court for a change of venue, which recites that, by consent of parties made in open court, it is agreed that the cause shall go to either one of two specified counties at the election of the plaintiff, is incomplete, until the plaintiff has made his election between the counties named, and the court has acted on his election by ordering the papers in the cause to be transmitted by the clerk to the county so chosen.

Motion for a *mandamus* to the judge of the third judicial circuit, presiding in the county of St. Clair. The facts upon which the motion is predicated, are as follows:

At the Spring term, 1852, of the Circuit Court of Talladega County, there was pending in said court a suit in favor of Ezekiel McCrary v. David H. Remson, in which, as appears by the record exhibited to the court, the following order was made at that term: "In this cause, on application of the plaintiff, and

for good and sufficient cause to the court now shown, a change of venue is ordered by the court, and by consent of the parties, made in open court, it is agreed that the cause shall go either to Benton or St. Clair Counties, at the election of the plaintiff; and plaintiff agrees that he will not read in evidence on the trial of this cause the deposition of Malcolm J. Walker; and cause continued."

It appears further from the record exhibited, that, at the September term, 1852, of the Circuit Court of St. Clair County, the following entry was made on the minutes of that court in said cause: "This cause is continued at the instance of the plaintiff, the defendant objecting that the cause is not properly in this court, and the motion to strike the case from the docket is also continued."

At the Spring term, 1853, of St. Clair Circuit Court, the clerk having placed said cause on the trial docket, the defendant renewed his motion to strike it from the docket, when the court overruled it, and decided that, under the order made by the Circuit Court of Talladega County, the venue had been changed to said County of St. Clair, and that the Circuit Court of St. Clair had jurisdiction, and that the cause was rightly on the trial docket of said court.

The defendant files this record in this court, and moves for a writ of *mandamus* to the judge of the Circuit Court of the third judicial circuit of this State, sitting for the county of St. Clair, commanding him not to entertain jurisdiction of said cause, and to strike the same from the docket of that court.

S. F. Rice, for the motion.

LIGON, J.—The only question presented for our consideration is, does the order made by the Circuit Court of Talladega County, as shown by the record, amount to a change of venue, in the case mentioned in it, to the county of St. Clair? If it does not, then it is clear the Circuit Court of the latter county has no jurisdiction of the case, and should have stricken it from the docket on the motion of the counsel for the defendant.

The order of the Circuit Court of Talladega, made on motion of the plaintiff, directs, in general terms, that the venue be changed, but designates no county in which it shall be tried on

such change of venue, and closes with a general order of continuance.

We apprehend that an order for a change of venue is never complete until the particular county in which the subsequent proceedings are to be had is expressly named in it. An order of the court that a cause be transferred to one of two counties, without designating which, would be too uncertain to be acted upon, and might often lead to confusion. Under such an order, one party might prepare himself for trial in one of the counties named, and his adversary in the other, or it would be left to the clerk to send the record to which of them he pleased, and thereby exercise a power and discretion which belong alone to the judge. Such an order would be void for uncertainty.

The order in this case is more imperfect and uncertain than the one in the case supposed, for it does not direct that the case be sent either to Benton or St. Clair County. It merely recites, that the parties have consented that the plaintiff shall have the right to elect to which of these counties the case shall be carried, without showing that he ever made such election, or that the court ever acted in the matter after the election was made, so as to give authority to the clerk to send the papers and record to the county designated, and invest the court of that county with the jurisdiction to try the cause.

Our opinion is, that until the plaintiff had made his election between the counties named in the agreement of the parties, and the court had acted upon the election so made by ordering the papers and records to be transmitted by the clerk to the Circuit Court of the county so chosen, the order was incomplete, and no change of jurisdiction had taken place, without which no other court can proceed in the cause.

We think the court below should have stricken the case from the docket.

Let a rule issue to the judge presiding in the third judicial circuit in this State for the county of St. Clair, requiring him to show cause why a writ of *mandamus* shall not issue on the application of said David H. Remson, in the case named in the record.

CARROLL *vs.* THE STATE.

1. A mere civil trespass upon a man's house, unaccompanied by such force as would make it a breach of the peace, is not a sufficient provocation to reduce the killing of the trespasser to manslaughter, if committed under circumstances from which the law would imply malice, as with a deadly weapon.
2. If the trespass is forcible, the owner may resist the entry, but he has no right to kill the assailant, unless it is rendered necessary to prevent a felonious destruction of his property, or to defend himself against loss of life or great bodily harm; if he kills the assailant when there is not a reasonable ground for apprehending imminent danger to his person or property, it is manslaughter; and, if done with malice, express or implied, it is murder.
3. If the assault is made under circumstances which would create a just apprehension in the mind of a reasonable man of imminent danger to his person or property, the owner may lawfully act upon appearances, and kill the assailant; the law does not require that the danger should be real.
4. An entry into a man's house, after a warning not to enter, does not amount to a forcible trespass.
5. In general, threats of personal violence made by the deceased against the prisoner, and not communicated to him, can only be received in evidence when they constitute part of the *res gestæ*.
6. The prisoner's confession cannot be rejected as evidence merely because the question to which it was a reply, assumed his guilt.
7. The officer who was conveying the prisoner to jail after his commitment, asked him "whether, if it was to do over again, he would do it;" to which the prisoner replied, "*Yes Sir-ree Bob*." *Held*, that the question and answer were admissible evidence.
8. Evidence that, in making this reply, the prisoner's "manner was short," is also admissible for the State.

ERROR to the Circuit Court of Autauga.
Tried before the Hon. NATHAN COOK.

THE plaintiff in error, John Carroll, was indicted for the murder of one John Key. On the trial, the State introduced evidence tending to prove that the deceased was found dead at the house of the prisoner, and that he came to his death from gun-shot wounds. The State then offered to prove, by one Goree, that he was one of the guard who conveyed the prisoner to jail after his commitment; that while he was conveying the

prisoner to jail, he asked him, with a view of ascertaining whether he felt any penitence, 'if it was to do over again, would he do it,' which question was objected to; but, on its being proved to the court that no threats were made, and no inducements held out to the prisoner, to induce him to make any confessions, the court overruled the objection, and the defendant excepted. The witness stated that the prisoner replied 'Yes Sir-ree, Bob;' to which answer the prisoner's counsel also objected, and moved to exclude it from the jury; but the objection was overruled, and the prisoner excepted. The State then asked the witness, 'what was the manner of the prisoner when he made the reply,' and the witness stated 'that his manner was short.' The question and answer were severally objected to by the prisoner, but his objections were overruled, and he excepted.

One witness testified, that the deceased had agreed to live with the prisoner during the year 1851, and was to receive one third of what was made on the place. Another witness testified, that the deceased had engaged as overseer for the prisoner during the year 1851, and was to receive a part of the crop as compensation for his services; and it was also in evidence that, some four or five days before the deceased was found dead, he and the prisoner met, and the latter stated to the deceased 'that he had told him to leave his place before, and he would not do it; that he then told him, if ever he entered his dwelling-house again, after a particular day which he named, he would kill him.' It was further in evidence, that, about ten or fifteen days before the deceased was found dead, the prisoner had requested one Skelton to see the deceased, who was at work in a field, and endeavor to get a settlement with him, and get him to leave the place; that Skelton went, and endeavored to get the deceased to submit to arbitration his work and the difficulty which had arisen between him and the prisoner—which the deceased refused; that the deceased also refused to leave the place of the prisoner, and said that, if ever the prisoner interfered with him, in any manner, form or shape, he would kill him, or beat him into mince meat, and that the prisoner was informed of this conversation, and of the threats thus made, before the deceased came to his death.

It was also proved, that, on the evening on which the killing occurred, the prisoner took the trunk belonging to the deceased,

and carried it and some clothing which belonged to him to the gate of the prisoner's premises; that the deceased slept in a room of the prisoner's house, and that, on the same evening, the prisoner sent a message to the deceased, to the effect that he wanted him to leave the place, and that, if he ever entered his house again, he would kill him; but this message was not delivered; that, about dark, the deceased came out of the field where he had been at work, to the gate of the prisoner's premises, and was informed by the latter that he wished him to leave the place, and that he then repeated the message which he had sent him; that the deceased said something in reply, which the witness did not understand; that, shortly afterwards the report of a gun was heard in the house; and soon after that the deceased was found dead in the room of the house in which he had been in the habit of sleeping, and into which he had entered five or six feet before he was shot; that his head was resting on the door-sill, his trunk lying across his body, and his feet towards the place where the prisoner was sitting with a gun by his side.

During the trial, the prisoner offered to prove that the deceased had made threats of personal violence against him about a fortnight before the killing occurred, other than those before detailed; but, it appearing that these threats had not been communicated to the prisoner before the killing, they were excluded by the court, to which ruling the prisoner excepted. The purpose for which these threats were offered was, to show the character of the conduct of the deceased in entering the house after he had been warned not to enter. There was no witness present at the time of the killing, nor was there any evidence of any act of violence done by the deceased after he had entered the house, unless his entry therein under the circumstances was an act of violence. It was also in evidence, that the deceased was stout and healthy, while the prisoner was old and infirm, and that the character of the former was that of a violent and quarrelsome man.

The prisoner's counsel requested the court to charge the jury, "that, if they believed from the evidence that the defendant had notified the deceased not to enter his dwelling-house, and that the deceased was a stout, healthy man, and the defendant a weak and infirm man, and that the deceased had previously threatened that, if the defendant interfered with him, in any

manner, form or shape, he would kill him, or beat him into mince-meat, and that the defendant knew of such threats, and that the deceased was a violent man, and that after the deceased was notified not to enter the dwelling house of the defendant he did enter it, and that after he had entered the defendant's dwelling house, and whilst he was in the house, the defendant killed him, under a well grounded and honest belief, created by all the circumstances, that it was necessary for him to kill the deceased, to protect his possession of his dwelling house, then the prisoner could not be convicted of murder in either degree;" which charge the court refused to give, and the prisoner excepted.

Elmore & Yancey and N. Harris, for plaintiff in error:

1. The evidence of Goree was conducive to show a confession of the murder by the prisoner, after he had been committed, and while in the custody of Goree. The question put by Goree was predicated upon and assumed the prisoner's guilt.—Commonwealth v. Mosler, 4 Barr 264; Clarissa v. The State, 11 Ala. R. 57; Stoke's case, American Law Register, May No. 1853.

2. The court erred in admitting the testimony of Goree as to the prisoner's manner in replying to his question.—Johnson v. The State, 17 Ala. R. 623. The answer of the witness, "that his manner was short," was but the conclusion or opinion of the witness, no facts being stated upon which to base it.

3. The court erred in excluding from the jury the threats of personal violence made by the deceased against the prisoner.—This evidence tended to prove the character of the deceased, and therefore was admissible. It also tended to prove the character of the act of entering the house, and that was material on the trial.— Riddle v. Brown *et al.*, 20 Ala. R. 412; Newton v. Holford, 47 En. C. L. R. 537; Prichett v. The State, 21 Ala. R. 42; Quesenberry v. The State, 3 Stew. & P. 308.

4. The charge asked should have been given, because; 1. It negatived the existence of malice on the part of the prisoner towards the deceased, and without malice, a party cannot be convicted of murder in either degree; 2. The killing of a person who commits a trespass on the dwelling house of another, is not murder, but manslaughter.—1 Russell on Crimes 662. A man's dwelling house is regarded as his castle, and when assail-

ed in it he is not bound to retreat; 3. The charge was correct as to the doctrine of reasonable apprehension of danger.—Oliver v. The State, 17 Ala. 598; Monroe v. The State, 5 Geo. R. 85; 1 Car. & P. 319; Cook's case, Cro. Car. 537.

P. T. Sayre, for the Attorney General, with whom was Thos. H. Watts, *contra:*

There was nothing improper in permitting proof of the conversation between Goree and the prisoner. The proper predicate was laid, the proof showing that no threats or inducements were held out to him to make confessions.—1 Phil. Ev. 116.

The court properly excluded proof of those threats which had not been communicated to the prisoner.—Powell v. The State, 19 Ala. 581. They are not competent even to prove character.—Wharton's Criminal Law 172; State v. Field, 14 Maine 246.

The charge asked was properly refused. No trespass on lands or goods will reduce the killing from murder to manslaughter—1 East's Cr. Law 233; 1 Russell on Crimes 455. So, every trial provocation, or even a blow, will not reduce the killing to manslaughter—1 East 234. It is not every entry into a man's dwelling house, that will justify a killing, or reduce it to manslaughter; a forcible attack must be made; some degree of violence must be used; the party slain must have no right to enter the house, he must be a trespasser.—1 East's Cr. Law 287. No man has a right to resort to extreme measures in the first place; he must first try gentle means.—McCoy v. The State, 3 English 454.

The proof in this case shows, that no violence was used by the deceased; that he was in the room in which he had been in the habit of sleeping; that he had a right to be there, by a contract which had never been abrogated by his consent; and being there under such a contract, he cannot be considered in the light of a trespasser.

The previous threats made by the deceased could not have affected the mind of the prisoner at the time of the commission of the act; and even if, from those threats, he believed that the deceased intended to kill him, he had no right to anticipate him, unless he attempted to execute his design, or was in a situation to do so, and thereby induced a reasonable belief that he intended to do it immediately.—The State v. Scott, 4 Iredell 415.

The record shows, that the conduct of the prisoner was violent, and calculated to excite to the highest degree the passions of the deceased; he had sent him word that he would kill him, if he again entered his house, and, without his knowledge, removed his trunk to the gate. The deceased is found dead in the room usually occupied by him, with his trunk, and the prisoner sitting at a little distance from him, with his gun. This shows that no violence was used by the deceased, and no inference of a design to use violence could be drawn from these facts.

In order to reduce the killing from murder to manslaughter, an attempt must have been made to take violent possession of the dwelling house. There must have been some effort to interfere with the prisoner's possession; the mere entry into the house, by one who had a right to enter, although commanded by the owner not to do it, does not constitute such violence.

The conclusion is irresistible, that the prisoner, in pursuance of his previously expressed design, shot the deceased as soon as he entered the room, and not because there was any "imperious necessity to take life," which must exist, in order to justify it.—Oliver v. The State, 17 Ala. 598.

GOLDTHWAITE, J.—We will first consider the questions presented by the refusal of the court to give the charge requested.

This charge was, in effect, that if the prisoner acted under a well grounded apprehension, created by all the circumstances, that it was necessary to take the life of the deceased to protect the possession of his own dwelling house, he could not be convicted of murder in either degree.* To ascertain whether this charge asserted a sound legal proposition, as applicable to the evidence, we must first determine the extent and degree of protection which the law affords to the inhabitant of a dwelling house in maintaining his possession.

Lord Hale says: "If A fears, upon just grounds, that B intends to kill him, and is assured that he provides weapons, and lies in wait so to do, yet without an actual assault by B upon A, or upon his house, to commit that fact, A may not kill B by way of prevention; but he must avoid the danger by flight or other means; for a bare fear, though upon a just cause, gives

not a man power to take away the life of another, but it must be an actual inevitable danger of his own life."—1 Hale's P. C. 51.

Again: "A is in possession of the house of B. B endeavors to enter upon him. A can neither justify the assault or the beating of B, for B had the right of entry into the house; but if A be in possession of a house, and B as a trespasser enter without title upon him, A may not beat him, but may quietly lay his hands upon him to put him out, and if B resists and assaults A, then A may justify the beating of him, as of his own assault. But if A kills him in defence of his house, it is neither justifiable nor within the privilege *se defendendo*, for he entered as a trespasser, and therefore it is at least common manslaughter;" and he cites Harcourt's case in support of this, who "being in possession of a house, A endeavored to enter, and shot an arrow at them within the house, and Harcourt from within shot an arrow at those who would have entered, and killed one of the company; which was ruled manslaughter, and not *se defendendo*, because there was no danger to his life from those without."—1 Hale's P. C. 485–6.

Mr. East, in his Crown Law, lays down the same doctrine, almost in the words of Lord Hale, and cites Cook's case, reported in Cro. Car. 537, which was where the sheriff's officer and bailiffs, having civil process against Cook, called to him to open his doors because he had such process; whereupon Cook forbid their entrance; upon which they broke the window, and then came to the door and tried to force it open, breaking off one of the hinges, upon which Cook discharged a musket and killed the officer, and it was held manslaughter.—East's Crown Law.

Hawkins says: "Neither can a man justify the killing of another in defence of his house or goods, or even of his person, from a bare private trespass; and therefore he that kills another who, claiming a title to his house, attempts to enter it by force, and shoots at it, or that breaks open his windows in order to arrest him, or that persists in breaking his hedges, after he was forbidden, is guilty of manslaughter.—Hawkins, 83.

It is to be remarked, that every case cited by these authors, in relation to a homicide committed upon an assault of the dwelling house, was one of actual positive force, exceeding a mere trespass; and in the case of the trespasser entering without title, while Lord Hale admits that, in case of resistance and assault,

the beating of him may be justified, he says that if A kills him in defence of his house, it is *at least* common manslaughter, for the reason that it was but a trespass; but we are no where told that taking life upon an assault is less culpable, under the same circumstances, than the same act upon an assault of the person. The rule of the common law is, that a man may repel force by force in defence of his person, habitation or property, against one who manifestly endeavors, by *violence* or *surprise*, to commit a known felony, such as rape, robbery, arson, burglary, or the like; and in these cases he is not obliged to retreat, but may pursue his adversary until he has freed himself from all danger.—1 East's P. C. 271–2; Fos. 271. In other cases, the law requires the use of every precaution consistent with safety, even to flight itself, before taking life; unless, indeed, the party has the protection of his house, which excuses him from retreating further (1 Hale, 484; 1 Russ. 545;) and this, we think, is the only difference between assaults upon the dwelling and upon the person, but that in all other respects they are governed by the same principles. The law laid down in the case of Mead, 1 Lewin C. C. 184, tends very strongly to support the views we have expressed. There, a number of persons who had abused Mead during the day, came in the night to his house, singing songs of menace and using violent language, indicating that they had come with no friendly or peaceable intention, and Mead, under the apprehension, as he alleged, that his life and property were in danger, fired a pistol, by which one of the party was killed. Holroyd, J., told the jury "that a civil trespass will not excuse the firing of a pistol at a trespasser in sudden resentment, or in anger. If a person takes forcible possession of another's close, so as to be guilty of a breach of the peace, it is more than a trespass. So, if a man with force invades and enters the dwelling of another. But a man is not authorized to fire a pistol on every invasion or intrusion of his house. He ought, if he has a reasonable opportunity, to endeavor to remove him, without having recourse to the last extremity. But the making of an attack upon a man's dwelling, and especially in the night, the law regards as equivalent to an assault upon a man's person; for a man's house is his castle, and therefore, in the eye of the law, it is equivalent to an assault; but no words and singing are an assault, nor will they authorize an assault in return."

Our conclusion is, that a mere civil trespass upon a man's house, unaccompanied with such force as to make it a breach of the peace, would not be a provocation which would reduce the killing to manslaughter, if it was done under circumstances from which the law would imply malice, as with a deadly weapon. For trespasses with force, it may be murder or manslaughter, according to the circumstances. The owner may resist the entry, but he has no right to kill, unless it be rendered necessary to prevent a felonious destruction of his property, or to defend himself against loss of life, or great bodily harm. If he kills when there is not a reasonable ground of apprehension of imminent danger to his person or property, it is manslaughter; and if done with malice, express or implied, it is then murder.

The rule as to the extent of protection to the dwelling being ascertained, there is but little difficulty in its application to the facts as stated upon the record. It is conceded most fully, that, if the evidence shows an assault upon the house, or the person, under circumstances which would create a reasonable apprehension—that is, a just apprehension in the mind of a reasonable man—of the design to commit a felony with force, or to inflict a personal injury which might result in loss of life or great bodily harm, the danger of the design being carried into execution being imminent and present, the person in whose mind such an apprehension is induced, and over whose person or property such danger is impending, may lawfully act upon appearances and kill the assailant. The law, in such a case, would not require that the danger should be real—that the peril should actually exist; but it does require that the appearances should be such as would excite a reasonable apprehension of such peril; and if such appearances do not exist, the killing would be either murder or manslaughter.

Assuming, therefore, that the deceased came to his death by the act of the prisoner, and by the use of a deadly weapon, and in the aspect of the case as presented by the charge requested, the question is simply whether the act was done under the necessity, real or apperant, which the law requires. If it was not, it follows necessarily that the prisoner was guilty either of murder or manslaughter; and if there was any evidence which tended to show that such necessity existed, the charge requested should have been given. Without referring to the evidence in detail,

it is sufficient to observe, that the bill of exceptions shows that none was offered of any act of violence on the part of the deceased, either in making the entry into the house, or after it had been made, unless the entry itself, after he had been warned not to enter, might be regarded as an act of violence. When the law speaks of a forcible trespass, it means such a trespass as would amount to a breach of the peace. Entering the house after a warning had been given, would have aggravated the trespass; but, if done without force, it would not have been a breach of the peace. The whole evidence, therefore, consisted of the previous threats made by the deceased, and the trespass committed by him. The threats, however, did not change the character of the trespass, and convert it into a trespass with force. We have seen that, although a forcible trespass upon the dwelling house may, in some cases, authorize the killing of the assailant, yet it is not every invasion even of this character upon a man's dwelling which will reduce the killing to manslaughter. The charge requested referred solely to the right of the prisoner to protect the possession of his house, and the circumstances, therefore, must tend to prove a reasonable apprehension on his part of the existence of such a state of facts as would relieve him from the crime of murder. Taken in connection with the evidence, then, the charge asserted the proposition, that where the evidence established only a trespass without force, it tended to create a reasonable apprehension, not only that it was committed with force, but under such circumstances as would be sufficient to reduce the killing to manslaughter. We think there was no error in the refusal of this charge.

In relation to the threats of personal violence made by the deceased towards the prisoner, which were excluded, we also think there was no error. The record shows they were not communicated to the prisoner, and we cannot therefore regard his action as having been influenced by them. But it is urged these were admissible to show the character of the conduct of the deceased in entering the house after he had been warned not to do so. The utmost that the threats could show in this aspect was, that the deceased entered the house of the prisoner with the intention of inflicting personal violence upon him, but the record does not show that any such violence was offered or attempted; besides, we are not informed as to the precise character of the threats,

and it is not every species of personal violence, even when offered against a man in his own house, that will reduce a homicide to the offence of manslaughter, when committed with a deadly weapon. Declarations of this character can, in general, only be received when they constitute part of the *res gestæ*, and as they were made a fortnight before the fact to which they were referred, were not admissible on this ground.

The only remaining question is, whether the court erred in its rulings in relation to the testimony of Goree. It is urged, on the part of the prisoner, that the objection to this evidence should have been sustained, for the reason that the question asked by the witness assumed his guilt, and was therefore calculated to entrap him. We have found no case which held that a question which assumed the guilt of the prisoner, was necessarily calculated to entrap him; and where that is not the case, we can perceive no sound reason for rejecting the evidence, upon the ground alone that the question in reply to which the confession was made, assumed the guilt of the party charged. The true test, we apprehend, is to ascertain whether the confession was made under circumstances which were calculated to render it untrue; and upon this principle, if it be made under the slightest inducement of hope or fear, excited by one having authority, it cannot be received. There may be questions so artfully put that the party to whom they are directed may, in answering them, not be aware of the effect of his answer; and, if admitted, it may be regarded as a confession when it was not intended as such by him; and this, we think, was the most that was meant by the dictum in the case of Mosler, 4 Barr 264. The case of Clarissa v. The State, 11 Ala. 57, is not authoritative on this point, as the decision was correct on the ground that the confession was made under the influence of the previous punishment the slave had received. In the case before us, we do not think the question was at all calculated to entrap the prisoner, and the objection on that ground is not tenable.

It is, however, insisted that the evidence should have been rejected, for the reason that neither the question nor the answer pointed directly to the commission of the offence. The question, it is true, did not refer in direct terms to the act with which the prisoner was charged; but we think that, under the circumstances, it could not properly have been referred to any other act.

We must presume, in the absence of evidence to the contrary, that the prisoner was possessed of ordinary intelligence, and if he was, the true import of the question addressed to him, after he had been committed for the murder of the deceased, by a person in whose custody he was, could not well have been misunderstood. We think it was sufficient to go to the jury, leaving its weight to be determined by them.

Neither do we think the court erred in overruling the objection either to the question or the answer, as to the manner of the prisoner. His answer to the question which preceded the one objected to, was of a character which rendered his manner, at the time it was said, very proper to go to the jury, for the purpose of determining the degree of weight to which his answer was entitled. If his manner had been that of the jester or buffoon, however unsuitable it would have been to the occasion, it might have diminished the weight that the jury would otherwise have attached to it. In the answer of the witness, we see nothing to object to. It used a term perfectly well understood, when applied to an answer, and was no more a conclusion than if he had used the word "quick," or "angry."

There is no error in the record, and the judgment is affirmed.

SMITH *vs.* THE STATE.

1. When an indictment containing four counts charges the defendant with playing cards "at a highway," "at a house where spirituous liquors were retailed," "at a public place," and "at a public house," while the evidence shows that the playing took place in a hollow more than one hundred yards from a house where spirituous liquors were retailed, and where the persons who were present at the playing had been drinking; that two persons first went to the hollow, and while they were playing the defendant and three others came; that they could not be seen from the grocery, nor from the road, which was a public one, nor could they see the road or grocery from the hollow; that witness had never, before or since, seen any playing at that place, and that there were no marks or signs of persons' having played there before, the evidence will not support a conviction under any one of the counts in the indictment.

Appeal from the Circuit Court of Marion.

Tried before the Hon. B. W. HUNTINGTON.

E. W. PECK, for the plaintiff in error.

A. MARTIN, for the Attorney General, *contra.*

PHELAN, J.—The defendant below was indicted for playing at cards. The indictment contains four counts: 1st. for playing "at a highway;" 2nd. for playing "at a house where spirituous liquors was then and there retailed;" 3rd. for playing "at a public place;" and 4th. for playing "at a public house."

On the trial the State introduced a witness, who testified, that within twelve months before the finding of the indictment, he saw the defendant play at a game of cards. He further stated that said playing took place in a hollow between one hundred and one hundred and fifteen yards from a house where spirituous liquors were retailed; that he and one other went to that hollow first, and were playing cards when the defendant and three others came, and defendant and one of them played one game; that they could not be seen from the grocery, nor the road which was public, nor could they see the road or grocery from said hollow; that he had never seen any playing at that place, before or since, and that there were no marks or signs of persons having resorted there or played there before. Witness could not say, on cross-examination, whether or not any person lse was at the grocery, except the five persons above mentioned. There was evidence going to show that those persons who played had been at the grocery drinking before the game was commenced."

"Upon this evidence" the court charged the jury as follows:

"If the jury believe from the evidence, that the playing took place in the hollow about one hundred yards from the grocery, in the day time, while the grocery was open for the retailing of spirituous liquors; that there were a number of persons assembled at the grocery for amusement or drinking about the time, or just before the playing commenced, and that those persons or the greater part of them, to the number of five or six, withdrew for the purpose of playing cards, or witnessing a game of cards, to the hollow spoken of, and there played, or witnessed

the same, being sufficiently convenient to the grocery for the purpose of drinking or being supplied with spirituous liquors, and of being joined by other persons that might visit the grocery while the game was going on, that the defendant is liable to a conviction under this indictment, if he joined in the game."

To this charge the defendant excepted, and the same is assigned for error.

We think the charge erroneous, for the reason, that the proof adduced did not show that the playing was done in any of the places charged in the indictment, and no conviction could be had without this under this indictment.

To contend that a hollow from one hundred to one hundred and fifteen yards distant from a grocery or public highway, at a point where the persons playing can neither see the highway or grocery, or be seen from them, is "*at*" the grocery, "or *at*" the highway, in the sense intended in the statute against unlawful playing "with cards or dice *at* any tavern, inn, &c." Clay's Dig. 432, § 8, would be manifestly to extend a criminal law by construction, rather than to confine it, which has always been the rule when the terms of such a statute have been open to construction at all.

There is nothing in the record which will admit of the argument, that the playing was at a "public house," other than the house where liquors were retailed, and that has been disposed of by the foregoing remarks.

The only other place that remains under this indictment is "public place;" and the question arises, was this hollow, one hundred yards or more distant from the grocery, and out of sight of that and the road, at a place not previously resorted to, and where five or six persons were present, a *public place* within the meaning of this statute against card playing? (Clay's Dig. 432, § 8.) We cannot agree that it was. The case of the State v. Bythwood, 21 Ala. 47, was very similar in its facts to this case. There the place where the playing took place was about "four hundred yards" distant from a store and the highway, but out of sight, in a hollow, and the persons present were eight in number. In both cases, the places where the parties played had not been previously resorted to for card playing.

We say in that case: "The facts and circumstances which distinguish this case do not, in our opinion, make the place where

the playing took place a '*public place*' within the meaning of the statute. These persons went to that hollow evidently to be out of the way of observation, to be in fact *concealed* from the public view; and it is not reasonable to hold that their being there made that retired and secluded spot a *public place*, merely because they went to play cards, when, as has been shown, the evil intended to be arrested was not the card playing itself, but the effect of the example upon others."

These observations, we think, will apply to this case; and the charge of the court, which, in effect, declares that the hollow where the playing took place was a *public place*, was erroneous.

The charge has been objected to on other grounds, but we do not deem it necessary to notice them, as this disposes of the case.

Let the judgment be reversed, and the cause remanded.

SCITZ *vs.* THE STATE.

1. Under an indictment for an assault with intent to murder, a special verdict finding the defendant "guilty of stricking with a loaded whip calculated to produce death, without any cause or provocation," does not authorize the rendition of a judgment of "guilty in manner and form as charged in the indictment."

ERROR to the Circuit Court of Tuskaloosa.

Tried before the Hon. GEO. D. SHORTRIDGE.

THE plaintiff in error, John Scitz, was indicted for an assault with intent to murder one Tabitha Lookingbill. The jury returned a special verdict, finding the defendant "guilty of striking with a loaded whip calculated to produce death, without any cause or provocation;" and the court thereupon pronounced judgment of "guilty in manner and form as charged in the indictment."

The plaintiff in error now insists that the rendition of this judgment was erroneous.

E. W. Peck and Nicolson, for plaintiff in error.

Attorney General, *contra.*

GIBBONS, J.—This was an indictment against the plaintiff in error for an assault with intent to murder. On the trial, the jury found the following special verdict, to-wit: "We, the jury, find the defendant guilty of striking with a loaded whip, calculated to produce death, without any cause or provocation," and asked the court to apply the law arising thereon, and to render judgment accordingly. The court thereupon rendered judgment of "guilty in manner and form as charged in the indictment," and sentenced the defendant to the penitentiary for the term of two years. The rendering of the judgment upon the special verdict, it is here insisted, was erroneous.

In order to make out the offence for which the defendant was indicted, it is necessary to show that the assault was made under such circumstances that, if the assault had resulted in the death of the party assaulted, it would have been murder.

We are unanimous in the opinion that this verdict did not authorize the judgment which the court rendered upon it. It is materially defective, in not stating the intent with which the assault was made, or the manner of it, by which the court would be authorized to infer the intent. It is evident that not every assault made with a weapon calculated to produce death would amount to an assault with intent to murder. An assault simply with intent to frighten, maim or wound, without producing death, or for the purpose of inflicting punishment or disgrace, is equally consistent with the finding of the jury, as that it was an assault with intent to murder. In the absence of any fact appearing in the verdict by which the court is informed that the assault was such as was charged in the indictment, the court ought not to have rendered its judgment in the way it did. The only fact appearing in the verdict, tending to show the manner of the assault, was, that it was with a weapon *calculated* to *produce death.* Admitting this fact, and it by no means follows that the offence is made out; for with such a weapon a very harmless assault may be made, and one without the slightest intention of taking life.

Again: In order to make out the offence, the assault should

have been found to have been made with malice, either express or implied. This the verdict should have shown as a distinct fact, or, as a part of the court hold, such facts and circumstances should have been found as that the court must necessarily infer from them malice. This the verdict before us does not show, and is defective in this point of view also. We do not now decide whether, in any case, the court would infer malice where the special verdict did not find it as a fact. That question we do not consider as necessarily arising on the record before us, as we all agree that, in both aspects in which we have considered the verdict, it is too defective to authorize the judgment that was rendered upon it.

Let the judgment of the court below be reversed, and the cause remanded.

Let the usual order be entered, directing that the defendant be remanded to the custody of the proper officer in Tuskaloosa, there to remain until discharged by due course of law; for which see a precedent at the conclusion of the opinion in the case of Spencer v. The State, 20 Ala. 24.

CAMPBELL *vs.* THE STATE.

1. A witness may be asked, and may state, his "opinion as to the time of day" when an event occurred.
2. So, also, he may state his opinion as to the length of time which elapsed between the happening of two events.
3. Evidence that the shoes taken from the feet of the horse ridden by the prisoner on the morning of the murder, "seemed to fit in every particular" the tracks found near the body of the deceased, is admissible against him.
4. When the evidence against the prisoner is entirely circumstantial, his conduct, his situation and locality, as affording him opportunities of knowing when the deceased left the school on the morning of the murder when she was last seen in life, and whether his being in that place at that particular time was or was not an unusual occurrence with him, are all circumstances which, though weak in themselves, are not so foreign from the main inquiry as to justify their exclusion from the jury as irrelevant.

5. On the trial of a prisoner indicted for murder, the evidence against him being circumstantial, it was shown that, on the second morning after the murder, he was seen coming from the direction of a house where two women, mother and daughter, resided, the daughter being an unmarried woman who had two children; that he had frequently been seen there before, at one time shaving and changing his clothes; that, on the evening of the same day, witness went to the house, and found the daughter alone, washing a man's shirt, which had splotches or stains on the bosom and cuff of the right sleeve; that "said splotches lookod more like the stains from chesnut timber than anything else witness could compare them to;" that no man lived in the house, and witness knew no man in that neighborhood who wore so fine a shirt. The witness was asked, whether any person inquired of him if he knew what would take stains out of shirts; to which he replied, that the question was asked him by the young woman, and gave his answer to it. The prisoner objected both to the question and answer, and also moved to exclude from the jury all that the witness had said about the shirt and the stains on it, but the court refused to do so. The young woman was afterwards introduced as a witness for the defence, and testified, on cross-examination, that the prisoner stayed at their house on the second night after the murder, that he left a shirt with her to be washed, and that she washed it. *Held*, that the evidence objected to by the prisoner was properly admitted.

6 and 7. A conviction for libel in another State does not disqualify a witness in this State; nor is the record of conviction admissible in evidence to discredit him.

8. It is no objection either to the competency or credibility of a witness, that he is subject to fits of mental derangement, if it appears that he is sane at the time he is offered.

9. When the competency of a witness is attacked on the ground of insanity, and the court decides in favor of his sanity, the evidence adduced to the court cannot be submitted to the jury to affect his credibility.

10. When evidence in adduced to the court on a preliminary examination touching the incompetency of a witness by reason of insanity, the Appellate Court will presume that the judge was not influenced by any evidence which he ought not to have considered.

11. The prisoner's confession that he had assisted to get another man's son out of jail, who would aid him in escaping, and the fact that this man had come twice to the jail where the prisoner was confined, are admissible evidence against him.

12. The declarations of the prisoner cannot be given in evidence in his favor, even for the avowed purpose of bringing out the reply of the witness to whom they were made, unless they constitute a part of a conversation drawn out in evidence by the State.

13. When a witness has been cross-examined respecting his former statements, with a view of impeaching him, he may be asked on re-examination in chief his motive in making those statements.

14. A party may ask his own witness whether he has not previously made statements inconsistent with what he has just stated on the trial.

15. A witness may be questioned, on cross-examination, as to his habits of drinking.

16. After the State has proved the appearance of the prisoner on the evening of the day of the murder and on the following day, the prisoner cannot be allowed to prove that, on the third day thereafter, when informed of the murder, he appeared surprised; nor can he be allowed to prove that he seemed astonished, when informed that he was suspected of the murder.

17. When a witness is introduced for the purpose of impeaching another by proof of his general character, and, on cross-examination, testifies, that public rumor imputed to the impeached witness "a bad moral character as to drinking, fighting, murder, shooting at men, and certain publications, reputed false, in his newspaper," he cannot be asked on re-examination in chief, 'what other moral delinquencies public rumor attributed to him;' nor, 'what rumor said in regard to those publications;' nor, 'whether he did not know of his own knowledge, that they were false.'

18. The general character of a witness at his place of residence, cannot be proved by evidence of what rumor said of it before he came to that place.

19. Evidence that several indictments for libel are pending against a witness, is not admissible for the purpose of impeaching him.

20. A letter written for the prisioner by the witness, while they were in jail together, is not admissible evidence for the prisoner, either as original testimony of its contents, or for the purpose of impeaching the witness.

21. Any evidence giving a history of the prisoner's acts on the day of the murder, is relevant, and admissible against him.

22. The prisoner's witnesses may be questioned, on cross-examination, as to their relations with the prisoner,—whether they were on terms of friendly intimacy—their means of knowing the facts to which they testify, and as to any liens or prejudices which might influence them.

23. An unmarried woman may be asked, on cross-examination, although she might refuse to answer, whether or not she has any children.

24. The county surveyor, a witness for the prisoner, illustrated his evidence with a diagram which he had himself made, showing the relative situation and distances from each other of several places near the scene of the murder. The diagram was introduced without objection from the State, and the witness was cross-examined on it. *Held*, that it was discretionary with the court to allow the jury to take it with them on their retirement, and its exclusion from them was not revisable on error

25. A witness for the State, who, on cross-examination, testifies that he has taken an active part in the prosecution, and that he cherishes unfriendly feelings towards the prisoner, may be asked, on re-examination, "whether his feelings towards the prisoner are such as to desire to see an innocent man convicted."

26. The individual opinion of a witness, founded on rumor respecting the guilt of another witness of the crime of murder, is not admissible for the purpose of impeaching the latter.

Error to the Circuit Court of DeKalb.

Tried before the Hon. Robert Dougherty.

James H. Campbell, the plaintiff in error, was indicted in the Circuit Court of Cherokee, at the Spring term thereof, 1851, for the murder of Martha Garrett. The venue was changed, on his application, to the County of DeKalb, where a special term was ordered to be held, commencing on the fourteenth day of June, 1852, for his trial; at which time he was tried and convicted, the trial lasting two weeks, and was sentenced by the court, on the finding of the jury, to the penitentiary for life.

On the trial, a bill of exceptions was signed and sealed by the presiding judge, which presents a number of exceptions to the rulings of the court in the admission and rejection of testimony, which are now assigned for error. For a better understanding of the case, it is proper to give a brief synopsis of the proof, about which there appears to have been no controversy, explanatory of the circumstances and condition of the deceased at the time she was found.

It appears that, on Sunday, the third day of December, 1850, the deceased, aged twelve years and thirteen days, left the house of her mother, who was a widow lady, residing three fourths of a mile from Centre, in which village is located the court-house of Cherokee County, to attend the Sabbath school which was then, and had been for several months previously, held in said court-house, and of which she had been a punctual attendant. On the next morning, her body was found some forty yards from the road leading from said village to her mother's, lying in a dry branch; her throat cut; two severe wounds on the head; her person violated, and one of her hips dislocated; her bible, hymn-book and handkerchief lying within about eighteen inches of her body. The last time she was seen in life, was upon the adjournment of the Sabbath school, about 11 o'clock, A. M., when she started home, making a pause of three or four minutes at the house of Mrs. Martin. The distance from the court-house to the place where the body was found, was about nine hundred yards.

The evidence tending to connect the prisoner with the murder, was circumstantial, and consisted also of confessions of guilt

made by him to one Edward Stiff. It appeared that, the evening before the murder, the prisoner had had a conversation with one West, about the purchase of a watch; that it was agreed between them, that West should bring the watch to him the next morning, (Sunday,) as he proposed going on that day to Gunter's Landing, to attend the races, and he wished to wager the watch on a horse-race; that West failed to bring the watch, and the prisoner spoke to several persons the next morning about his intention to go for it to Mrs. Covington's, where West boarded, and who resided about a mile from the village of Centre.

It appears that, at the time when the Sabbath school adjourned, the prisoner was at a tavern in the village, kept by one Asa Allen, near enough to observe the adjournment; that, some short time after the adjournment of the school, he borrowed a horse from one Joseph Street, and left the tavern about 11 o'clock, but the testimony was conflicting as to the precise time; that he went to Mrs. Covington's, remaining there about five minutes; but there was a conflict in the evidence, as to the time of his departure from Centre, the length of time he was absent, and the exact time of his return; that horse-tracks were found, diverging from the road from Centre to Mrs. Covington's, and extending in the direction of the place where the body was found, and the evidence conduced to prove that these were the tracks of the horse ridden that morning by the prisoner. It was also shown that the water in a pool, situated between the place where the body was found and Mrs. Covington's, was discolored with blood on the third day after the murder, and that the heel of the defendant's boot corresponded in size with tracks made near the edge of the pool.

A large number of exceptions are set out in the record in relation to the admission and exclusion of evidence; but, as most of them are noticed at length in the opinion of the court, it is not deemed necessary to recapitulate them in this place.

Mrs. Shackleford, a witness for the defence, testified, that her husband kept a tavern in Centre; that Campbell was one of their boarders; that she had his washing done, and knew the number of his drawers; that he ate dinner at their house on the Sunday of the murder; that they sat down to dinner about 12 o'clock; that Campbell was at home some fifteen minutes before

dinner was ready; that she saw his shirt bosom, and it was the same one he had on the Saturday evening before; that she saw no blood or other stain on the bosom. On cross-examination of this witness, the State's counsel asked her the following questions: Whether she had any drawers in defendant's room? Whether she had made any vest or shirts for him? Whether she had ever darned or mended any of his clothes during his stay at her house as a boarder; to which she answered, that she did, as she had also done for other boarders. To each one of these questions the prisoner, by his counsel, objected; his objection was overruled, and he excepted.

Miss Anthony, a witness for the defendant, testified, that she saw him, on the morning of the murder, get the horse ridden by him that day, and start out of town in the direction of Mrs. Covington's, and that it was then some time after 11 o'clock.—On cross-examination by the State, she was asked the following questions: "Do you not recollect where you first met the defendant?" "Campbell called there, I suppose?" "Where did you next meet him, the defendant?" "Do you recollect where you met the defendant the next time?" "Was the defendant, Campbell, a frequent visitor at Mr. Weir's house?" "Did you ever go to any assembly, ball, church or show, in company with the defendant, Campbell?" To this last question the witness answered: "Mr. Campbell went to preaching with me once or twice." "Was it before the murder of the deceased that you went to preaching with the defendant?" "Had not Campbell made propositions of marriage to you before the death of Miss Garrett?" "Has he not made propositions of marriage to you since the death of Miss Garrett?" To each one of these questions, and to the answer above stated, the prisoner objected; his objection was overruled, and he excepted. "The State then proved by the witness, that she was a witness before the grand jury by whom the indictment was found; that after she had been in the grand jury room, before sundown on the same day, she was sitting in Mr. Weir's house; that Mrs. Weir was absent from home, at some place in the village; that the front door of the house, which was on the street, was closed, and the back door was open; that some members of the grand jury knocked at the front door, and then went in. The State then offered to prove by the witness that

the said grand jurors, on getting into the room, found the defendant sitting in the room with her alone. To this the defendant objected; his objection was overruled, and he excepted. The witness answered, that Campbell was sitting in the room, conversing with her at the time."

Jane Matheny, a witness for the prisoner, testified, on cross-examination, "that she had known Campbell for some ten or eleven years, and that she had never been married; that since the prisoner returned from Mexico, has visited witness every week or so; never has stayed away longer than seven weeks. The State then asked her: "Have you any children?" to which defendant objected; his objection was overruled, and he excepted; the witness answered, that she had two children.—The State then asked her, where her mother was on the day that Coggins swore she had shown him a shirt. To this question defendant objected, his objection was overruled, and he excepted. The testimony of the said Jane Matheny conduced to prove, that the defendant had stayed all night at her mother's, with whom the witness then and now lives, on Monday night after the murder; that he left there Tuesday morning; that he left a shirt to be washed, and that she washed it. The attorney for the State asked her, what she was doing the day after Campbell left? To this question defendant objected, his objection was overruled, the witness required to answer, and defendant excepted. She was then asked by the State's counsel, "Where did your mother go that day?" To this question defendant objected, his objection was overruled, and he excepted. Witness was asked by the counsel for the State, "Did you not have a conversation with Mr. Ryan, a few weeks after you moved to Frank Hail's, in which you said, "Campbell has neglected me; if Campbell don't mind, I will tell all I know about it." Question objected to by defendant; objection overruled; witness required to answer, and defendant excepted."

"James Gaines was introduced by defendant to prove the general character of said Edward Stiff; proved it bad; was asked, on cross-examination, upon what he based his opinion, and what Stiff had done to give him a bad character; to which defendant objected, his objection was overruled, and he excepted. Witness said, he had heard men say that when Stiff was interested, they would not belive him on oath. He was asked by the

State, who he had heard say so, and where, and when. To the question defendant objected, objection overruled, and defendant excepted.

"Henry Cole, a witness for defendant, before he was examined in chief, was sworn to answer questions; and was asked by the State, 'whether he had not made revelations to one of the counsel of the defendant, as to what he would swear.' The question objected to by defendant, objection overruled, and defendant excepted. After the said Henry Cole was put on his examination before the jury, he was asked the same question; defendant again objected, was overruled, and excepted."

"One Counts, a witness for defendant, was asked by the State, 'if he did not tell Jane Matheny that Campbell was suspected of the murder of Miss Garrett.' Question objected to by defendant, and objection overruled; defendant excepted. Witness answered, he did not."

The other matters of exception will be readily understood from the opinion and briefs.

A. J. Walker, for plaintiff in error:

Joseph C. Street should not have been allowed to state his "opinion," either as to the time of day when Campbell left the town of Centre, or as to the period of his absence. Though the court may conclude that a witness may give his judgment from surrounding circumstances, as to the time when an event occurred, or as to length of time, yet, it is evident that, here, the question to the witness and his answer are illegal, because they do not ask or give his judgment founded upon the surrounding circumstances, or upon the impressions on his mind at the particular time. There may, possibly, be a knowledge of time, and of duration of time, derived from surrounding circumstances, which strike every man, and about which there is so much uncertainty that it is difficult to distinguish it from belief. In this instance, the witness was precluded, by the form of the question, from answering from even such knowledge, and was restricted to his "opinion," which may have been derived from rumor, from calculations subsequently made, based upon the representations of others, or from some other illegitimate source. 1 Green. Ev. 488 § 440; 1 Phil. Ev. 226, 227, (top p. 209;) Head, use &c. v. Adams, 9 Ala. R. 791, in which case "belief"

is used as synonymous with "best recollection," or "knowledge" about which the witness was not positive; Cameron & Cooper v. The State, 14 Ala. R. 546; Jones v. Hatchett & Bro., *ib.* 744; Hatchett & Bro. v. Gibson, 18 *ib.* 587; Andrews & Bro. v. Jones, 10 *ib.* 470; 4 *ib.* 46; 5 *ib.* 546; Hawthorn v. King, 8 Mass. R. 371.

It is competent for a witness to prove a fact which is the result of a combination of minor facts; and, in this point of view, it might, possibly, have been competent for the witness to state, from the position of the sun with reference to the cardinal points of the compass, or from the length of the shadows cast, or from other circumstances which are recognized criteria in the determination of time, that his best knowledge, (or, possibly, his best judgment,) was, that Campbell left at a given hour, and was absent during a given time. But, in this instance, the witness gives "his opinion" without reference to such facts, or to any facts.—14 Ala. R. 360; *ib.* 154; 10 *ib.* 290; 4 Har. & McH. 63, 64; 6 Conn. 9; 1 Stark. Ev. mar. p. 127.

The "opinion" of the witness as to time and length of time, was, *prima facie*, incompetent. If there was any additional matter that would have made the question legal, it was the duty of the State to have added it. Even though it be allowable to ask a witness his "opinion" of time, as predicated upon facts within his knowledge, the question propounded to Street was inadmissible, because he was not asked for his "opinion" deduced from facts within his own knowledge, but for his opinion generally. Certainly, the opinion of a witness as to time cannot be asked, unless he is referred to facts upon which to base his opinion. It is, however, earnestly insisted, that it is not competent in any case, saving a few exceptions, for a witness to state his judgment even on facts known to himself: it is his duty to state the facts, and leave the jury to draw the conclusion, or form the judgment.—Bullock v. Wilson, 5 Porter 342; Given v. Albert, 5 Watts & Serg. 333; Garrett v. The State, 6 Miss. 1. Distance is susceptible of certain ascertainment.

Asa Allen should not have been permitted to say that the shoes "seemed to fit in every particular." It is not a statement from knowledge, but an inference or conclusion.

Allen's statement, that Campbell "occasionally visited his house, but not so often as others," was totally irrelevant; it

had no bearing on the case in any way, and ought to have been excluded. Even though an inference against the prisoner might possibly be drawn from his unaccustomed presence at Allen's house about the time of the adjournment of the Sunday school, yet there is no predicate for such an inference: it was not shown that the school was in session. His presence, an act harmless in itself, authorized no inference against the prisoner. His presence at any other place in the town of Centre, would have afforded the same evidence, as it might be said that he visited that place "occasionally, though not as often as others." The relevancy of testimony is a question to be determined by the court at the time the testimony is offered. If it is then *prima facie* irrelevant, the preliminary facts connecting it with the case must be proved, or the counsel must state their intention or expectation of proving them.—Bilberry, adm'r. v. Mobley, 21 Ala. R. 277; Abney v. Kingsland, 10 *ib.* 355; Scott v. Coxe's Adm'rs, 20 *ib.* 295; Lawson & Swinney v. The State, 20 *ib.* 65; 9 *ib.* 534; 16 *ib.* 316; 6 *ib.* 390.

The testimony of Coggins, as to stains on a shirt, was irrelevant. It could have no pertinency to the case, unless it had been shown, 1. that the stains were from blood; 2. that the shirt was Campbell's; and, 3, that he wore the shirt on the day of the murder. None of the preliminary facts necessary to connect this evidence with the case were proved. The testimony conduced to show that the stains were not of blood. The facts that Campbell had been occasionally seen at Mrs. Matheny's house, that no man lived about the house, that Campbell had at one time been seen there, shaving and changing his clothes, that he had also been seen, on the morning preceding the evening when the shirt was seen, coming from towards Mrs. Matheny's, and that the witness knew no person in the neighborhood who wore so fine a shirt, do not collectively prove, to the satisfaction of any mind, that the shirt was Campbell's. There was not even an attempt made to show that Campbell wore the particular shirt seen by the witness on the day of the murder. The authorities are clear, that the preliminary facts must be proved to the satisfaction of the mind of the court. It is not sufficient that there is a probability of possibility of the existence of those facts; there ought to be, at least, a preponderance of evidence in favor of the hypothesis that the facts are true. In the case

of Scott v. Coxe's Adm'rs, 20 Ala. R. 296, there was a very high degree of probability of the correctness of the facts showing the legality of the proof, and a total impossibility of obtaining better evidence to establish the claim; yet the court say: "It is not sufficient that there may be some evidence tending to establish the preliminary fact; it must be established to the satisfaction of the court by competent proof."—Hart v. Newland, 3 Hawk's R. 122; 11 Serg. & R. 134; U. S. Bank v. Corcoran, 2 Peters' R. 132; Jackson v. Norris *et al.*, 7 Cowen's R. 717.

If it is contended that the relevancy of this evidence is shown by the testimony of Miss Matheny, and that therefore there is only error without injury, the answer is: I. Miss Matheny was introduced as a witness by the defence, and not by the State. In the case of Lawson & Swinney v. The State, 20 Ala. R. 78, the precise question here presented did not arise, as the connection was made by the testimony of the State. Whenever the court admits illegal evidence, and thereby, in effect, asserts that it ought to influence the minds of the jury, and thus compels the defendant to submit to the injurious consequence of such evidence, or to meet and rebut it by the introduction of counter evidence, injury is sustained. Compelling a party wrongfully to enlarge the area of the examination, and to accumulate evidence upon an irrelevant subject, is error, from which the court must presume that injury resulted. In this instance, if the shirt seen by Coggins did belong to Campbell, it was in the power of the State to prove it by introducing Miss Matheny. But, instead of introducing her, the State procures the admission of irrelevant evidence, and thus compels the defendant to introduce her, to rebut the evidence; and the State is thus enabled to assail her credibility, and obtain the advantage of the legal position that the portion of her evidence in favor of the accused, and in conflict with that of Coggins, must be disbelieved, and that portion which militated against the accused must be credited.—The effect is, to compel the accused to introduce a witness who makes the connection, and then deprive him of the benefit of the testimony when it favors him. If a written instrument, to which there was a subscribing witness, were offered in evidence, and it was admitted by the court without proof of its execution, would this court hold it to be error without injury, if the other party

should introduce the subscribing witness, to prove that the instrument, although actually executed, was procured by fraud or duress? And would the court hold this when an attempt was made to discredit the subscribing witness by the very party who was bound by law to introduce him? II. The testimony of Miss Matheny does not prove that the shirt which Coggins saw was Campbell's: she only proves that Campbell left a shirt with her on Tuesday morning, and that she washed it on that day; but she does not prove that that was the only shirt she washed that day, or that it was the shirt which Coggins saw, or that Coggins ever saw the shirt which she washed. III. It was not only essential for the State to show that the shirt seen by Coggins was Campbell's, but also that Campbell wore it on the day of the murder. It would be inconsistent with the law, which presumes a man innocent until his guilt is shown, to shift the *onus* of proof, by requiring the accused to show that he had not left with Miss Matheny the shirt which he wore on the day of the murder: the *onus* was on the State.—Innerarity v. Byrne, 8 Porter's R. 180. IV. There was no proof that the stains were at all similar to those produced by blood.

If an error is shown to exist, it devolves on the other party clearly to show that such error did not and could not injure the prisoner. If the error could possibly have injured the accused, this court will reverse.—14 Ala. R. 182; 15 *ib.* 623; 21 *ib.* 423; *ib.* 549; 8 Porter 180. The bill of exceptions states enough to show that the court erred in the admission of Coggins' testimony as to the shirt. It cannot be intended by this court, in the absence of a statement to that effect in the bill of exceptions, that there was other evidence which would have made it legal.—Davis v. The State, 17 Ala. R. 415.

The question propounded to Coggins, 'If any person asked him if he knew what would take stains out of shirts,' was clearly illegal, because it asked for the declaration of a third person, and involved an inquiry totally irrelevant to the case; it was well calculated to injure the defendant by making the impression that some person was solicitous on the subject of "stains on shirts." So, also, the reply of Coggins to the question of a third person was, in no point of view, competent evidence.—Winlock v. Hardy, 4 Litt. 272.

A conviction for libel in the courts of a sister State, either renders a witness incompetent to testify, or is admissible evidence

to the jury as affecting his credibility. Upon the question of competency, the following authorities are referred to: The State v. Ridgley, 2 Har. & McH. 120; Clarke's Lessee v. Hall, *ib.* 378; Cole's Lessee v. Cole, 1 Har. & John. 572; The State v. Candler, 3 Hawks' R. 393; 1 Bouv. Law Dic. 396; Roscoe's Crim. Ev. 135; 1 Phil. Ev. 22, 23; Rex v. Ford, 2 Salk. 690; 3 Phil. Ev. (Cowen & Hill's Notes) 1503.

Although the court may conclude that libel is not a species of the *crimen falsi*, according to the common law, which is presumed to prevail in Ohio, yet the conviction for an offence not infamous, committed in a sister State, is competent evidence to affect the credibility of a witness. In cases where the infamy of a conviction is removed by a pardon, the conviction is evidence as to credit. In Massachusetts, where the courts hold that the disqualifications which attach to a conviction of an infamous crime in another State, do not apply to the felon when offered as a witness in that State, the conviction is competent evidence as to credit. The reasons of the rule, that particular acts of immorality cannot be proved on the trial, do not apply to record evidence of a conviction of crime. If the evidence here offered is not admissible to affect the credit of the witness, it would follow that a witness may be convicted, in a sister State, of acts involving moral turpitude, until he would not be credited as to the most trivial concerns of life, and yet may cross the State line and testify in a criminal case as a credible witness, because depositions cannot be taken to establish his bad character in the locality of the convictions.—Commonwealth v. Abner Rogers, 7 Metcalf's R. 501; Commonwealth v. Knapp, 9 Pick. 511; Commonwealth v. Green, 17 Mass. 502; Carpenter v. Nixon, 5 Hill's (N. Y.) R. 260; Sorrelle v. Craig, 9 Ala. 528; Holman's Heirs v. Bank of Norfolk, 12 Ala. 408; United States v. Jones, 2 Wheeler's Criminal Cases 151.

The determination of the question of Stiff's insanity, and consequent incompetency to testify, was for the court.—Livingsten v. Kierstead & Hermance, 10 Johns. 261; Roscoe's Criminal Evidence 121; Harris v. Wilson, 7 Wend. 60; Witter v. Latham, 12 Conn. 392; Reynolds v. Lounsberry, 6 Hill 534; 1 Green. Ev. 472. The evidence adduced to the court to establish Stiff's insanity, is submitted without argument, because the limits of a brief will not permit a full discussion of it. The

court is referred on this subject to Ray's work on Insanity.

The jury were entitled to know the mental *status* of the witness, in order to correctly ascertain the degree of confidence to be placed in his testimony. On that account, the evidence on the subject of insanity should have been allowed to go to them. Facts proving the mental and moral condition of a witness have often been admitted as evidence.—10 Serg. & R. 285; 15 Mass. 184.

The question propounded to Thomas B. Cooper, whether he had furnished a portion of the facts contained in the pamphlet, was illegal and irrelevant.

The question of sanity involved the inquiry as to the condition of the witness' intellect at the time of the trial. L. M. Stiff had seen his father but twice before the trial in three or four months. No previous degree of intimacy would render his opinion on the question of sanity competent at the time of the trial. It is not improbable the excitement of the trial may have elicited a manifestation of insanity, which had not been witnessed for a long time before. The opinion, however, was not asked, as founded upon the facts within his knowledge, but was sought and obtained without reference to those facts.—Norris v. The State, 16 Ala. 776; Baldwin v. The State, 12 Missouri 234.

It was clearly competent for L. M. Stiff to state whether or not there was inconsistency between the professions and acts of the witness whose sanity was controverted. It is unaccountable that he should be competent to give his opinion upon the question of sanity, and yet incompetent to answer the question propounded.—Norris v. The State, *supra*; Baldwin v. The State, *supra*.

The fact of Weir's visiting the jail twice, was totally irrelevant. The simple statement was, that Weir went to the jail twice; but these visits are not shown to have been to Campbell, or to have had any connection with him in any way.

Stiff had deposed to confessions made by the accused. After the rumor had gone forth, that such confessions had been made, an interview took place between him and Campbell on the subject of these confessions. For the purpose of discrediting the witness, the defence asked, 'What did Campbell say on the particular occasion,' with the announced purpose of bringing out the reply of the witness. It is now insisted, that this was com-

petent evidence, because the reply of the witness to the prisoner could not have been understood without a disclosure of the matter to which it was a reply. Admissions may be drawn from the conduct, actions and declarations of a party; and so, also, of a witness. The question was confined to the subject of the confessions proved by Stiff, and its purpose was simply to discredit him.—1 Green. Ev. 514 § 462.

The permission of the witness to testify as to the secret motive for the conduct which was relied on to discredit him, was objected to. A witness must testify as to facts, and not as to the secret emotions of his mind. Can the impeachment of a witness be avoided by the statement that his intentions are pure? If not, for what purpose could such evidence be admissible? No conviction for perjury could ever be had on account of a false statement of the sentiments or feelings of a witness.—P. & M. Bank of Mobile v. Borland, 5 Ala. 546; Peake v. Stout, Ingoldsby & Co., 8 *ib.* 648.

The declarations of the witness Blanton conflicting with his testimony, were incompetent for any other purpose than to impeach him. It is not allowable for the State to impeach its witness, under the guise of refreshing his memory. The place at which the declaration was made, was not stated to the witness.

It was competent to prove that the witness Clayton had been drinking at the time he was testifying, or at the time of the occurrences which he proved; but the general question of "his habits as to drinking," was inadmissible. The same argument that would prove the competency of such evidence, for the purpose of showing the state of his mind, would prove the competency of the evidence of insanity offered to affect the credit of Stiff.

The witness Clayton should have been allowed to state the appearance of Campbell, and his acts, when the intelligence of the murder was communicated to him. The State had been permitted to prove how a horse-shoe "seemed" to fit a track.—This court has decided, it was but to pronounce the judgment of the witness upon a passing event, and "is knowledge, so far as the imperfections of human nature will permit knowledge of such a matter to be acquired." Baldwin v. The State, 12 Miss. 238. The appearance of an accused man is evidence

against him, and certainly ought to be evidence in his favor.—Johnson v. The State, 17 Ala. 618. The State had been permitted to introduce the same kind of evidence, as to Campbell's looks and appearance, which was proposed for the defence.—Harris v. Taylor, 13 Ala. 324.

The question propounded to W. B. Watts was, certainly, a proper one, because it is in itself competent evidence, and because it was rebutting to evidence brought out by the State. It would be manifestly unjust, to permit the State to prove that public rumor imputed to the assailed witness certain moral delinquencies, *not involving his veracity*, leaving the impression that public rumor imputed no other immorality, and then debar the defence from eliciting proof of other moral delinquencies, which deprived the witness of all claim to credibility.

The question, 'What does rumor say in regard to those publications,' was legitimate. Certainly it was admissible in response to the cross-examination in reference to those publications. It is submitted to the court, whether the question calling for the witness' "knowledge of the truth of those publications," was not permissible in reply to the cross-examination by the State.

It was legitimate for the defence to extend its inquiry into Stiff's character as far back as possible, and, in doing so, to propound the question, 'What does rumor say of his general character before he came to Cedar Bluff.' The State opened the inquiry as to what rumor said of Stiff's character, and obtained the full benefit of it. Is it not manifestly unjust and unlawful, to permit the State to prosecute the inquiry just so far as suited its interests, and then to stop any extension of the investigation?—Taylor v. Harris, *supra*.

The letter to John K. Hoge was submitted to Stiff, and its authorship proved by him. The letter, then, was clearly competent evidence to contradict him. The entire spirit of it is in conflict with the idea that Campbell had confessed to him the atrocious crime attributed to him.

The evidence as to Campbell's manner when informed by Sampley that suspicion attached (to him) was permissible, to rebut the proof made by the State as to his appearance. His manner and appearance, however, were competent evidence.

The card-playing, and the fact of defendant's winning money

in connection with William H. Stiff, were alike inadmissible, either against the defendant, or against Wm. H. Stiff's credibility.—Johnson v. The State, *supra*; Nugent v. The State, 18 Ala. 526.

The two questions which were propounded to Mrs. Shackleford, and excepted to, were irrelevant and improper.—11 Wend. 20.

The questions propounded to Miss Anthony, as to the places where she met the defendant, were improper. It could make no difference, so far as this case is concerned, where she met him. So, of all the questions propounded to this witness by the State to which exceptions were saved. The entire examination of this witness seems to have been based upon the idea, that friendly relations with the accused were sufficient grounds for the impeachment of her credit.

It was not competent to ask Jane Matheny whether she had children, she being an unmarried woman. Particular acts of this character cannot be given in evidence to discredit a witness. Even her general character for chastity was not competent.—18 Ala. 526.

The question, where Jane Matheny's mother was on the day when Coggins said he saw the shirt, was irrelevant. So, of the question asked her, 'What were you doing the day after Campbell left;' for her acts and declarations Campbell was certainly not criminally responsible.

The map ought to have been left with the jury, to be taken out by them on their retirement. It had been admitted in evidence, was commented on, cross-examined on, and the court had charged the jury; and when the jury were about to retire, the map was taken from them, on the ground that neither the prosecutor nor the State's solicitor was present.—Nolin v. Parmer, 21 Ala. 66; Morrison v. Wright, 7 Porter 67; Lankford v. Keith & Weir, 21 Ala. 342. The map was put in evidence, and was not withdrawn; nor was it asked to be withdrawn. The question is not as to its competency as evidence, but whether, being evidence, the jury should take it out with them on their retirement.—Clay's Digest 341 § 155.

It was not permissible for the State to prove, by M. Hail, that he did not desire the conviction of an innocent man, for the purpose of counteracting the proof of his hostility to the ac-

cused. The proof admitted and excepted to, in the connection in which it came out, was tantamount to this: 'I think the accused guilty—I do not wish to convict an innocent man—I do not deem the accused innocent, and therefore I desire his conviction.' This testimony is objectionable, also, because the moral sentiments of a man must be inferred from facts, and cannot be proved by a profession of them. How could such testimony be disproved? An impeached witness is safe, if his professions sustain his credibility.

The question asked Gaines, 'What had Stiff done to give him a bad character,' was illegal.

The fact that Cole had made a relation of his evidence to the counsel for the accused, did not tend to impeach him. There was no impropriety in his doing so, and it was, in no point of view, a proveable fact in the case.

The question to Counts was illegal.

P. T. Sayre, for the Attorney General, with whom was L. E. Parsons, *contra:*

Exceptions 1 and 2. There was no error in allowing a witness to state his opinion as to the time of day, or as to the duration of time. There is no other way of proving when an event occurred, or the length of time which transpires between certain events. These are matters of general experience, knowledge of which is gathered by observation, and can only be proved by opinion. Persons who never saw a time-piece, and who are unacquainted with figures, are capable of arriving at very correct conclusions as to time, although they may be unable to explain the particular process by which their conclusions were attained. — Lester v. The Town of Pittsford, 7 Vermont R. 161; McKee v. Nelson, 4 Cowen's R. 357; 1 Phil. Ev. 291; 1 Green. Ev. § § 7, 11; 2 U. S. Digest 259, § 1267.

Ex. 3. It is difficult to see any objection to the form of expression used by the witness, who testified that he saw the horseshoe applied to the tracks, and that they "seemed to fit:" it was only another way of saying that they did fit.

Ex. 4. The testimony of Asa Allen, that Campbell visited his house "occasionally, but not as often as others," was properly admitted. This proof was material and relevant, when taken in connection with the other proof in the case. It was

shown that a person standing in the door of Allen's house could see when the Sunday school adjourned, and that Campbell was at his house during the morning, and left it about the time when the school usually adjourned.

Ex. 5 and 6. Coggins' testimony was properly admitted. The object was, to connect Campbell with the murder; and every fact and circumstance which could possibly throw any light upon the matter, was admissible. Coggins' testimony, all taken together, conduced to show that Campbell was in the habit of going to Mrs. Matheny's house; that he was there on Monday night after the murder, that he sometimes changed his clothes there, that no man lived about the house, and that the shirt seen by Coggins was unlike those commonly worn in that neighborhood. These facts were persuasive, if not conclusive, to show that the shirt belonged to Campbell. At all events, the testimony was competent to go to the jury. Testimony ought not to be excluded from the jury on account of irrelevancy, unless it is clearly irrelevant.—Shannon v. Kinney, 1 A. K. Marsh. 3; 2 Watts & Serg. 415; Bell v. Rhea & Co., 1 Ala. R. 85; Cuthbert v. Newell, 7 *ib.* 459; 21 Wend. 548; Cowen & Hill's Notes, Part I, 433. The evidence of Coggins was introduced for three purposes, viz: to establish that the shirt belonged to Campbell; that there were stains upon it; and that it was being washed for the purpose of removing stains. Not only the appearance of the shirt itself, but every thing that was said about it in connection with stains, while it was being washed, was therefore admissible, to show that there were stains upon it, and that the object in washing it was to remove them. The conversation was a part of the *res gestæ*, and served to explain Miss Matheny's possession of the shirt.—19 Ala. R. 727; Enos v. Smith, 3 Conn. 250; Green. Ev. § 108. The proof also shows, that Campbell left his shirt at the house to be washed. This constituted Miss Matheny his agent for that purpose, and rendered her declarations, made while washing the shirt, admissible evidence against him, as part of the *res gestæ*. "An agent is authorized to act; and, therefore, his acts, explained by his declarations during the time of acting, are obligatory on the principal."—4 Serg. & R. 317. It will be presumed that the court below required the proper predicate to be made.—McCrary v. The State, 22 Ala. R. 70.

Ex. 7, 8, 9 and 10. The competency of Edward Stiff as a witness was objected to on two grounds, viz: because he had been convicted of a libel in the State of Ohio, and because he was insane. 1. At common law, conviction of a libel did not render a witness incompetent.—7 Com. Dig. 462; 1 Phil. Ev. 24. Under our statute, a witness is not disqualified for that reason.—Clay's Digest 169 § 2. But if the law was different, a conviction in Ohio would not have that effect in this State.—Commonwealth v. Green, 17 Mass. 541. The question of insanity was properly determined by the court, as the preponderance of proof was certainly in favor of the sanity of the witness at the time of trial.

The record of conviction, and the evidence offered to the court on the subject of insanity, was not admissible evidence to the jury to affect the credibility of Stiff as a witness. In impeaching a witness, his general character only can be put in issue.—Particular acts of moral turpitude cannot be proven.—1 Green. Ev. § 461; 1 Phil. Ev. 291; 4 Wend. 257. Libel is not an infamous crime, and a conviction of it would not tend to affect the credit of a witness any more than the proof of any other falsehood, told by him, which is not of record. At common law, the truth of the libel could not be given in evidence. In inquiring into general character, three questions, it is said, may be asked: 1. What is the general character of the witness for truth when upon oath? 2. What is his general character for truth when not upon oath? 3. What is his general moral character?—Cowen & Hill's Notes, Part I, note 531. Applying these tests to the testimony, it surely does not come within the rule. The record of conviction does not prove that the general character of the witness for truth and veracity, was bad; neither does it establish that his general moral character was bad. If it establishes neither of these points, it was incompetent.

The same reasons obtain in reference to the evidence on the subject of insanity. The law does not recognize any degree of insanity; it does not say that a man is sufficiently sane for one purpose, and insane for another. When insanity is established, it is presumed to be the general condition of the mind. This is a fact, too, upon which the court must decide before the witness is examined; and when it is decided that he is sane, he is a witness, governed by the same rules which apply to all other

witnesses. The mere fact that his sanity has been questioned, does not authorize an attack on his character in a manner different from that prescribed for impeaching other witnesses. The court had decided that Stiff was sane; and the attempt was, to induce the jury to overrule the decision of the court. The issue of insanity *vel non*, had been once determined by the court, and the proposition is then made to try the same issue again before the jury.

Ex. 11. T. B. Cooper was asked, on cross-examination, if he had not furnished Stiff with a portion of the facts contained in the pamphlet. The exception to this testimony was properly overruled. The object was to establish Stiff's insanity, partly by the contents of the pamphlet, about which Cooper testified; and if the facts upon which that pamphlet was based, were furnished to him by Cooper, it would certainly tend to relieve the witness, in some degree, from the charge of insanity based upon the pamphlet. Besides, this was a preliminary examination by the court, in which a judge is not governed by the strict rules of evidence.—Hartford v. Palmer, 16 Johns. 144; Givens v. Herndon, 16 Ala. 261.

Ex. 12. L. M. Stiff was properly allowed to state his opinion as to his father's sanity. Edward Stiff returned from Cuba in 1851; his son swore that he had seen him repeatedly since that time, and twice during his confinement at Lebanon. Besides, he was qualified to give an opinion because he was his son.—Norris v. The State, 16 Ala. 776.

Ex. 13. The defendant asked L. M. Stiff whether there was not an inconsistency between the professions and acts of his father. The exception to this question was properly sustained, as the answer to it could only have been the statement of an opinion of the witness. He should have been asked, what were the professions and acts of his father, that the jury might form their own conclusion as to their consistency or inconsistency.—Johnson v. The State, 17 Ala. 623.

Ex. 14. The testimony covered by this exception was properly admitted. A man's flight after an offence is committed, may be proven against him, as a circumstance tending to show guilt; and, upon the same principle, an attempt to escape from custody, or the expression of an intention to escape, is a circumstance which may be proven for the same purpose.—The

People v. Rathbun, 21 Wend. 518; Oliver v. The State, 17 Ala. 587, 595.

Ex. 15. The conversation which occurred in the jail between Stiff and Campbell, and all that Campbell said on that occasion, was properly rejected as evidence. The State had introduced no proof in reference to that interview, and had brought out no part of that conversation: the court, therefore, properly excluded it.—Oliver v. The State, 17 Ala. 595; McLane v. The State, 16 *ib.* 672; Bradford v. Bush, 10 *ib.* 389; Tilley v. The State, 3 Iredell 424.

Ex. 16. An attempt was made by the defence to impeach the testimony of Stiff, by showing that he had made contradictory statements; and the court then allowed the State, against Campbell's objection, to prove by the witness his motives in making the statements which were said to be contradictory. There was nothing wrong in this.—1 Phil. Ev. 294; 1 Green. Ev. § 467.

Ex. 17. A witness has a right to refresh his memory by looking at a memorandum; so, if his memory appears at fault, it is not erroneous to refer him to any fact or circumstance by which it may be refreshed. This was all that was done in reference to the witness Blanton. The witness had a right to refresh his recollection by all legal means, and the State had the same right; and this, *after* cross-examination.—1 Green. Ev. § § 462, 467.

Ex. 18. Clayton, a witness for the defence, was asked by the State as to his habits of drinking, to which the defendant excepted. This was not erroneous. The object was, to ascertain a fact by which to test the capacity of the witness for observing things that transpired around him, and of remembering them afterwards. Any question may be propounded to a witness, which will serve to show that he was or was not in a condition properly to observe or to remember. For instance, if he was examined in reference to a matter requiring keenness of vision, he could be questioned as to the condition of his eyes; if in reference to a question of science, he could be interrogated as to his proficiency in that science. So in reference to general matters; it is proper that the condition of the witness in body and mind, at the time when the events occurred about which he testified, should appear before the jury, in order that

his testimony may be properly weighed.—11 U. S. Digest 287 § 1912. The party against whom a witness is introduced, has a right to show every thing that may impeach his credit.—13 Serg. & R. 132. To do this, his general character as to drunkenness may be proveen, and it would be for the jury to say whether he was drunk at that particular time.—Tuttle v. Russell, 2 Day's R. 201; Brindle v. McIlvaine, 10 Serg. & R. 285; 1 Green. Ev. § 446.

Ex. 19. There was no error in refusing to allow the question to be put to Clayton, 'whether Campbell did not seem surprised when the report of the murder, &c., was communicated to him.'—Johnson v. The State, 17 Ala. 623.

Ex. 20, 21 and 22. The questions propounded to W. B. Watts by the defence, as to the "other moral delinquencies which public rumor attributed to Stiff," were illegal and irrelevant, and properly excluded by the court.—See authorities cited under exceptions 7, 8, 9, and 10; also, Cowen and Hill's Notes, Part I, 766.

Ex. 23. This exception is to the ruling of the court in excluding proof that there were six indictments for libel pending against Stiff in the Circuit Court of Cherokee. It was not competent to prove the existence of these indictments in that way: the records were the best evidence of that fact.—1 Green. Ev. § 457.

Ex. 24, 25 and 26. The letter written by the witness Stiff to Hoge, was properly excluded, because the proof shows that it was written in Campbell's presence, and by his direction. It contained, therefore, Campbell's own statements and opinions, and not those of Stiff; and consequently it could not establish that Stiff had made contradictory statements, or expressed different opinions.

Ex. 27. For this point see exception 18.

Ex. 28. The State proved that Wm. H. Stiff and Campbell played at cards with one Vaughan on the evening of the day on which the murder was committed. The witness was also asked, if he and Campbell did not win some money from Vaugham, and answered affirmatively. The question was objected to as irrelevant. Taken by itself, this evidence might be irrelevant; but an effort was made to impeach the testimony of Edward Stiff, who proved certain confessions of Campbell's, and it was

therefore proper to allow proof of every circumstance tending to corroborate his statements: this was the only purpose for which it was offered. Edward Stiff had sworn that Campbell, while making said confessions, used this language: "The world was easily humbugged; himself and Buck Stiff had won, on the same Sunday the murder took place, Vaughan's horse and money, and made him believe he was his friend all the time." Stiff was in jail at the time the playing took place, and had no opportunity of knowing anything about the matter, except what Campbell told him. Proof that part of what he said was true, is, at best, a corroborating circumstance to which the jury may look.—Cowen & Hill's Notes, Part I, 779.

Ex. 29, 30, and 31, were taken to the testimony of Mrs. Shackleford, during her cross-examination. It was competent to make any inquiry calculated to throw light on the subject, or to show the feelings of the witness towards the prosecution or the prisoner.—Cowen & Hill's Notes, Part I, 773; 1 Green. Ev. § 446.

Ex. 32 to 42. The same rule applies to all the exceptions which were taken to the testimony of Miss Anthony.

Ex. 43 to 46, were to the testimony of Miss Matheny. Some degree of intimacy was shown to exist between her and Campbell; her testimony differed from that of Coggin, and it was perfectly proper to apply to her every test known to the law.—1 Cowen & Hill's Notes 729.

Ex. 47. The court properly refused to let the survey go to the jury. It was not an official survey, and possessed none of the dignity of documentary evidence. It was a survey which the law did not require the surveyor to make, and was therefore *ex parte*.—Surget v. Little, 5 S. & Mar. 329. No notice was given to any one representing the State, that such a survey would be made; and the mere fact that it was made by the legally appointed surveyor, lends it no weight or authority, the act not being official. This view is not opposed to the case of Nolin v. Parmer, 21 Ala. 66.

Ex. 50, 51. When witnesses are introduced for the purpose of impeaching character, it is always permissible, on cross-examination, to ascertain the grounds on which they base their opinion.

Several other exceptions were taken to the rulings of the court, but there does not appear anything objectionable in those rulings.

CHILTON, C. J.—The record presents a number of exceptions to the rulings of the presiding judge with respect to the admission of evidence, and as the statute makes it our duty to examine the entire record, and to notice errors, if any have intervened, whether assigned for error or not, it will, perhaps, facilitate our inquiries to take them up in the order in which they are stated in the bill of exceptions, premising, that it would render this opinion too prolix to elaborate the several points which are raised, and that, while we trust we have given to each the consideration which the importance of the case demands, we must be content to state our conclusions, and omit the reasons in many instances upon which they rest.

1. Joseph C. Street was allowed to give "*his opinion*" as to the time of day the prisoner left Centre, the witness stating that he had no time-piece. This evidence was admissible.—Every person of ordinary perception and observation, must be regarded as capable of giving an opinion upon a matter of this nature—a matter upon which every man's knowledge and experience are supposed to qualify him to approximate a correct conclusion. We apprehend no case can be found asserting a different doctrine. Indeed, we know of no case where the point was ever called in question, and yet it is one involved in almost every trial.

2. The same principle covers the objection to the witness' testifying as to the length of time the prisoner was absent from Centre, the witness having seen him when he left and when he returned.

3. The shoes of the horse which the prisoner rode were taken from his fore feet, the horse having no shoes on his hind feet, and were applied to the track leading from Centre to Mrs. Covington's, in the direction of where the body of the deceased was found; and a witness who saw them thus applied, was allowed to depose that "they seemed to fit in every particular." The prisoner's counsel contends, that, before this could be made legal evidence, it must be shown that the shoes fitted the horse's foot. This was a circumstance, doubtless, about which he might well have cross-examined the witness, to ascertain whether the shoes fitted the indentation made by the horse's hoof, or by the shoes in the earth. In the absence of proof to the contrary, we must presume that, in fitting the shoes to the tracks, they were ap-

plied to the tracks which the shoes made; and in this view, the proof was not only legal, but constituted a circumstance which might become of importance in pointing out the rider as the guilty agent.

4. Asa Allen, the proprietor of the tavern from which the prisoner started in Centre, was allowed to testify that the prisoner "occasionally visited his house, but not as often as others." This was objected to as irrelevant.

It is certainly the duty of the judge to confine the evidence to the points in issue, that the attention of the jury may not be distracted and led off from them, nor the public time needlessly wasted; but in cases like the present, depending upon circumstantial evidence, it often becomes a most embarrassing question to determine what circumstance is too remote to admit of any reasonable direction to the jury, in arriving at a conclusion upon the main point of inquiry. It seems to be well settled that, if no presumption to be drawn from the circumstance offered in evidence ought properly to have any weight upon the minds of the jury, the court should exclude it.—1 Phil. Ev. (3 Ed.) 460. Circumstances may be minute, and, considered separately, of very little importance, shedding but a dim ray of light upon the transaction sought to be elucidated; yet, when grouped together and considered in the aggregate, they may constitute a chain of evidence which draws the mind to a very satisfactory conclusion. An illustration of this is furnished by the case of Mendum v. The Commonwealth, 6 Randolph's Rep. 704. The defendant was indicted for murder, committed by stabbing with a dirk. It appeared that a dirk without a cap had been found secreted near the place of the murder; and the cap of a dirk, engraved J. H., was handed to a witness, by a negro, a mile and a half from the place, but how the negro came by it no one could tell. The handle was engraved with the letters J. H.; and it appeared that some 16 or 17 years before, a witness purchased a dirk, with this engraving, for James Hickman, the half brother of the prisoner; that Hickman had since died, and the prisoner had admitted that a dirk was the only part of Hickman's property he had received. The witness who heard him make this admission saw a dirk in his hands, with J. H. engraved on the handle, but could no farther indentify it with the one now produced. The dirk found secreted

was, from its general appearance, indentified as the one produced on trial, and the cap produced by the negro apparently fitted the handle. The prisoner had, before the murder, lent a dirk, not indentified on the trial, which was returned to him before the murder was committed. There was no proof that the prisoner had ever been at or near the place of the murder.—These circumstances were allowed to go to the jury, as evidence that the dirk found belonged to the prisoner, and they were told that, if they had no doubt of its being his property, then the prisoner's dirk so found made one circumstance to be weighed with others. The annotators upon Philips, (Cowen & Hill, 3 Ed., vol. 4, p. 508, n. 307,) in commenting upon this case, say: "Now it is obvious how perfectly slight, and utterly inconclusive, any one, or any two or three, of these circumstances must have been; yet all being combined, the result of the trial (a verdict of guilty) shows that the jury felt safe in acting upon them, as leaving no doubt."

So, also, the conduct of the prisoner, his situation and locality, the opportunities he had of knowing when the deceased left the school, and whether his being found in that position at that particular time was or not an unusual occurrence with him, are all circumstances very weak in themselves; yet not so wholly foreign from the main inquiry as to justify their rejection.—"Every thing calculated to elucidate the transactions is admissible, since the conclusion depends upon a number of links, which alone are weak, but, taken together, are strong and able to conclude."—McGann v. The State, 13 Smedes & Marshall 471.

"Presumptions from a man's conduct," says Mr. Russell, (7 Amer. Ed., vol. 2, p. 72,) "operate in the nature of admissions; for, as against himself, it is to be presumed that a man's actions and representations correspond with the truth."—See also 3 Stark. Ev. 26.

Tested by these rules, it is clear the proof made by Asa Allen was proper, as it tended to show whether the defendant, in being at his tavern near the court-house, on the Sunday morning of the murder, was in an unusual place. That it may have been exceedingly weak, matters not. It was not wholly foreign from the case, but tends, though remotely, to elucidate it.

5. The prisoner was seen on Tuesday morning after the mur-

der, by a witness named Coggins, coming from the direction of the residence of a Mrs. Matheny, where the witness had frequently seen him on previous occasions. Mrs. Matheny, it appears, did not reside in the neighborhood of the prisoner. She lived with her daughter Jane, an unmarried woman who had two children, without any other person in the family. Coggins testified that he had seen the prisoner there one morning before the Tuesday spoken of, shaving and putting on clean clothes; that on the Tuesday evening after the murder, while the elder Mrs. Matheny was at his house weaving, he called at her house to get a drink of water; found no one there but Jane; she showed him a man's shirt having a neat linen bosom; that there were splotches on the bosom, three or four small stains about the size of a grain of corn, which looked more like the stains from chesnut timber than anything else the witness could compare it to; that there was also a splotch on the cuff of the right sleeve about the size of a half dollar. It was the only garment being washed which he saw; that Jane put some soap on it, and hung it on a chair; that no man lived about the house, and witness knew of no man in that neighborhood who wore so fine a shirt. The witness was asked, if any person inquired of him if he knew what would take stains out of shirts? to which question the prisoner objected, but the court permitted the witness to answer, that the question was asked him, and to give his reply as to what would do it, and the defendant excepted. He also moved to exclude from the jury all the witness had said with reference to the shirt and the stains upon it, but the court refused to do so. The prisoner's counsel insists that this proof was irrelevant. It appears that, after this proof was allowed, Jane Matheny was introduced by the prisoner, and her testimony conduced to show that the shirt spoken of by the witness Coggins, belonged to the prisoner, which proof was elicited upon cross-examination on the part of the State.

It is frequently difficult to ascertain, *a priori*, whether proof of a particular fact will or will not become material; and it is usual in such cases for the court to allow the proof, upon the assertion of counsel that the fact offered to be proved will turn out to be material.—4 Phil. Ev., C. & H., n. 307, p. 598, 3 Ed.; or that some other fact, upon which its relevancy may depend, will, in due time, be proved. In such case, if the subsequent

proof is not made, the court will exclude that dependent on it from the jury. "But it is different, however," say the annotators above referred to, "where the proof tends apparently, in its own nature, to make out the case, though the residue be not offered."

We should be strongly inclined to hold that, aside from the evidence subsequently made by Miss Matheny, tending to connect the prisoner with the shirt, the proof was properly received. He was frequently seen at this house—was seen that morning going from the direction of it; no male person resided there; and he had been seen to change his clothes there on a former occasion;—the shirt was being washed, and the inquiry as to what would take out the stains, but seemed to call the witness' attention more particularly to them, and being connected with the possession and washing by Jane, formed part of the *res gestæ*. We, as we have intimated, think it may well be questioned whether this proof was not proper for the jury, had no other evidence of the ownership of the garment been introduced; but we do not entertain a doubt of its being rendered entirely competent by the evidence made by Miss Matheny, who proved that it belonged to the prisoner. That the ruling of the court in its admission may have induced the prisoner to introduce the witness Jane, thereby making her his witness, may be true; but we do not perceive how this can affect the legality of the proof previously offered, and which it connects; nor does the record show that the prisoner was under the necessity of introducing her, by the ruling of the court.

That it was competent to prove that stains were found upon the shirt, we think, is shown in the previous portion of this opinion. It was for the jury to determine the weight to which such circumstance was entitled, and whether said stains were caused by chesnut timber, or by blood.

6. Upon the trial of the cause, one Edward Stiff was allowed to testify to certain confessions made by the prisoner to him.—The prisoner insisted that he was an incompetent witness, because he had been convicted of publishing a libel in the Court of Common Pleas, of Hamilton County, in the State of Ohio, the record of which conviction was read to the court.

Waiving the consideration of the question, whether a conviction of an infamous offence in another State would render the

convict incompetent to testify in this, it is sufficient to state, in response to this objection, that a conviction for libel does not disqualify the witness. In England, where, for a libel against the government, a party was condemned to stand in the pillory, thus superadding ignominious punishment, it was held not to render him incompetent to testify as a witness.—Gilb. 127; 2 Russ. on Cr. (7 Amer. Ed.) 974. Our statutes have not changed the common law in this respect.

7. The prisoner, after the court ruled that the witness was competent notwithstanding the conviction of libel, offered the exemplification of the record of said conviction in evidence as tending to discredit the witness, but the court rejected it.

We do not see upon what principle the evidence offered could be allowed. It did not tend, even in respect to the subject matter of the libel, to prove that the party had perverted the truth; for, by the common law, which we must presume, in the absence of proof to the contrary, obtained in Ohio, the truth of the matter averred as libellous could not upon a criminal prosecution be given in evidence.—1 Russ. on Cr. 222. The most, therefore, the record would prove is, that the witness wantonly or maliciously published a piece in the newspaper, which, although it may have been true, was calculated to irritate and incite to a breach of the peace. In Utley v. Merrick, 10 Met. Rep. 302, it was held, that a conviction of the offence of obtaining goods on false pretences, did not render the party an incompetent witness, and that the record of such conviction could not be given in evidence for the purpose of affecting the witness' credibility.

There would certainly have been more propriety in receiving the evidence in the case just cited than in this, for that was a matter which affected the defendant's veracity; this does not.

8. The prisoner offered another objection to the competency of Stiff as a witness, namely, that at the time he was called to testify, and for some time previous thereto, he was and had been insane.

To this point there was a great mass of testimony offered to the court, consisting of extracts from a newspaper which was shown to have been edited by the witness and his son, but the articles from which the extracts were taken were shown to have been prepared by the witness. Some of these related to the

great advantages that would accrue to the country, and especially to Cedar Bluff, the village where the paper was published, from the construction of a rail road from that point to Gunter's Landing, as "the most feasible and important link in the grand chain of communication between the Atlantic sea-board and the mighty valley of the Mississippi." In speaking of the consummation of such an enterprise, he says, "Our own beautiful plain is destined for the locality of perhaps the first city in the State of Alabama:—Who doubts it?"

The record abounds with extracts, some of which are of a personal character, reflecting upon individuals whom he names, and who, he supposes, have conspired to injure him in various ways. It also contains several pamphlets, shown to have been written by him, and which indicate a love of the marvelous, and that the mind of the author is wont to feed upon the stimulus of exciting subjects even at the hazard of involving his personal safety, a consequence upon which, at the same time, his writings indicate perhaps a morbid sensibility. It would, however, render this opinion too prolix to attempt to set out this proof, much less to comment upon it in detail. The question was, whether the witness, conceding him to have labored under mental delusion at a previous period, was at the time of the trial of sound mind; and upon this point we have the concurrent testimony of his son, L. M. Stiff, and of three physicians, namely: Doctors Rawls, Lawrence and Sparks.

Doctor George was of opinion that the witness had naturally an excessive development of the imagination, and he inclined to the opinion, which he had formed from his writings and vague conversation, and from a letter received from him, that the witness was affected with monomania.

9. Neither do we think the judge erred in excluding from the jury the evidence offered to prove the witness insane, as affecting his credit.

It is no objection either to the competency or credibility of a witness, that he may be subject to fits of derangement, if at the time he is offered it appears that he is sane.—3 Phil. Ev. p. 6, note 6, and cases cited; Evans v. Hettick, 7 Wheat. 453; James v. Stonebanks, Coxe's Rep. 227; 10 Ser. & R. 282; 4 Phil. Ev. C. & H. Notes, p. 753 n. 387.

10. The questions attempted to be raised upon the objections

to testimony offered *to the court* upon the preliminary inquiry as to Stiff's sanity, we need not review; for the proof being for the consideration of the judge alone, we would not intend he was influenced by any evidence which was not proper to be considered by him, and for the more satisfactory reason, that, excluding all the evidence objected to, enough remains to exclude any reasonable doubt as to the witness' competency.

11. The witness Stiff, having been admitted to testify, was allowed to prove, against the prisoner's objection, that the prisoner told him that he (the prisoner) had assisted by means of a false key to get old man Weir's son out of jail, who was in prison upon a charge of horse-stealing, and that Weir would assist the prisoner in escaping. He also testified that Weir had come to the jail twice, which was likewise objected to by prisoner's counsel.

In Dean v. The Commonwealth, 4 Grattan 541, the offer of a prisoner to bribe the person who had him in custody, to permit him to escape, was held properly receivable in evidence against him, although the offer and the attempt was made when the prisoner had been committed on a charge of a different offence from that for which he was tried, the charges for both offences being founded on the same fact. It is a portion of the prisoner's conduct, or rather of his declarations indicating a line of conduct, operating in the nature of admissions.—2 Russell on Cr. 729. And the fact that Weir came to the jail, only serves to show that the prisoner had the opportunity afforded him of having entered into the arrangement with him.

12. The prisoner, having proven by Stiff that a conversation was had between him and Stiff, in the presence of several persons, relative to an expected difficulty between the witness and prisoner, growing out of the report that the defendant had made confessions of guilt, asked the witness, with a view of bringing out the witness' reply, to state all that the defendant, Campbell, had said to him in that conversation. The counsel for the State objected to this evidence, and the court refused to allow the question to be answered. We are unable to perceive any error in this. The defendant could not give his own declarations in evidence, unless they constituted a part of the conversation which had been drawn out at the instance of the State, which was not the case here.

If the object was to impeach Stiff, he should have asked whether he had not made certain statements at this time and place. In this way his reply would have gone before the jury, or, if he denied making the statements, he would be subject to be discredited by proof that they were made.

There is certainly no rule of law which would justify the prisoner's making evidence for himself, by proof of his own declarations, as a means of getting at the reply of the witness who is introduced against him.

13. It appears, however, that after the court rejected the prisoner's declarations, the question was asked the witness Stiff, whether he had not made certain statements in the jail, in the presence of certain persons, laying the predicate for impeaching said witness. Stiff replied, that he had made statements, but they were different from those propounded to him, and that he had evaded answering the questions in the presence of the jailer and others. The State, to rebut any presumption which might be drawn unfavorable to the witness from such evasion, inquired for the motive which induced his conduct on the occasion referred to, in not communicating freely on the subject of confessions. This was objected to, but allowed.

It is a well established rule of law, that where a witness has been cross-examined respecting his former statements with a view of impairing his credit, the counsel who called him has the right to re-examine him, so as to afford him an opportunity of explaining such statements, (2 Russell on Cr. 937;) and it is also said by the same authority, that he may be asked what induced him to give to the person or persons to whom he made the communication the account which he has stated in the cross-examination.—*ib.* 937; 2 Brod. & Bing. 297. These authorities show that there was no error in admitting the witness Stiff to make the explanation, as to the motive which influenced him in saying no more than he did about Campbell's confessions on the occasion inquired of in the cross-examination.

14. The State's attorney was allowed, against the defendant's objection, to ask a witness on the part of the prosecution, (Blanton,) whether he had not on the day preceding made statements conflicting with those he now made on the trial; the avowed object of the examination being to refresh the witness' memory.

Whether it is permissible for a party to propound such question to a witness whom he has called, is a question upon which there exists some diversity of opinion. Professor Greenleaf, (vol. 1, § 444,) in his work on Evidence, collects the authorities in a note, and says in the text that the weight of authority is in favor of admitting the party to show that the evidence has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial; or that the witness has recently been brought under the influence of the other party, and has deceived the party calling him. "For, it is said, this course is necessary for his protection against the contrivance of an artful witness, and that the danger of his previous declarations being regarded as substantive evidence, is no greater than it is where the contradictory declarations are proved by the adverse party."—See the cases cited, Note 1 to vol. 1, Greenl. Ev. p. 601, 3d ed. The same doctrine seems to be sanctioned by the annotators on Phillips, (Cowan, Hill & Van Cott,) vol. 4, pp. 769–70, Note 395.

The point underwent a thorough discussion in Wright v. Beckett, 1 M. & R. 414. In that case, the witness for the plaintiff testified directly against him, and the plaintiff's counsel asked him (as was asked in the case before us) whether he had not given a different account of the facts to the plaintiff's attorney two days before. This question was objected to, on the ground of its obvious tendency to discredit the witness; but the objection was overruled, and the question was allowed to be put. The cases are ably reviewed by Lord C. J. Denman, who arrives at the conclusion that there is no direct authority compelling the exclusion of such evidence, but some of the cases appeared on principle to prove it admissible, and as truth and justice might materially be affected by its exclusion, he held it proper.

Mr. Baron Bolland dissented, and also delivered an opinion embracing his views.

Mr. Phillips, in his work on Evidence, (vol. 2, p. 560) after stating the arguments *pro* and *con.*, concludes, that upon a review of the arguments, the superior force of reasoning is decidedly with Lord Denman. The rule has been since generally acted on, in accordance with his view, by the English courts.—See Dun v. Arlett, 2 Moody & Rob. 122; *ib.* 153; Phil. & Am. on Ev.

904; Rex v. Oldroyd, Rus. & Ry. 88; Rice v. New Eng. Marine Ins. Co., 4 Pick. Rep. 439; Brown v. Bellows, *ib.* 179; 1 Haw. 437; 6 Watts & Serg. 285.

We are disposed to regard the doctrine as maintained by Lord C. J. Denman, and sanctioned by Professor Greenleaf and Mr. Phillips, as correct, at least to the extent of allowing the inquiry to be put to the witness. Whether we would go farther and hold that another witness might be called to prove his conflicting statement, is not a question now before us, and one which we do not decide.

Although we cannot well see how the inquiry could refresh the witness' memory, yet as the question was proper in another aspect, and no injury was illegally done the prisoner, there was no error in admitting it.

15. The defendant introduced one Sampson Clayton as a witness, and on cross-examination he was asked by the counsel for the State as to his habits of drinking.

In order to ascertain the credit due to the testimony of a witness, the jury should be informed of his opportunity for observation, the accuracy with which that observation has been conducted, the fidelity of memory with which it is related, the witness' habits, pursuits, his conduct, disposition, situation in life, his relation to the parties, &c. Indeed, it would be impossible to define the exact limits to which a cross-examination may extend, and beyond which it may not go; for much must be left to the sound discretion of the court, regulated by the general rules of evidence, as applied to the varying circumstances of each case.—3 Phil. Ev. 588. The great object is, to elicit the truth from the witness; and a searching cross-examination is often a most efficacious test for its discovery. "By means of it," says Professor Greenleaf, "the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory and description, are all fully investigated and ascertained," &c.—1 Greenl. Ev. § 446. Tested by the rules governing cross-examinations, it is very clear that the question propounded to this witness might not only have been entirely proper, but indispensable in arriving at his inca-

pacity to have observed with accuracy the facts and circumstances about which he was called to testify.

16. The State having proved the appearance of the prisoner the evening of the day of the murder, and on the following day, the prisoner offered to prove that on the third day thereafter, while at Lebanon, on being informed of the murder of Miss Garrett, he appeared surprised; but the court, on the objection of the counsel for the prosecution, rejected the proof. In this we think the court committed no error.

We have seen that the conduct of the prisoner may be given in evidence against him, on the ground that, as against himself, a man's conduct and representations are presumed to correspond with the truth, (2 Russ. on Cr. 739); but, as presumptions from conduct operate in the nature of admissions, the prisoner could no more make his appearance or conduct evidence, than he could his declarations or admissions.

The mind and conscience may be so overpowered by a sense of guilt, and of the awful retribution which attends it, as involuntarily to compel the person thus affected to furnish external manifestations of its existence, and such indications are properly enough received against him. Whereas, on the other hand, a person never so guilty may, at times, so far succeed in stifling his conscience, and suppressing his real emotions, as to subject his conduct as well as his appearance, in a great measure, to his volition, and thus simulate a demeanor apparently inconsistent with guilt; and to allow such demeanor to go in evidence, at his instance, would be to permit him to manufacture evidence for himself. This also disposes of the exception to the exclusion of Sampley's proof, that when the prisoner was informed by him that he was suspected of the murder, he seemed astonished.

17. The defence proved by William B. Watts, that he was acquainted with the general character of Edward Stiff, who had been examined by the State, and that he would not believe him on oath in a court of justice. It appears that the State, on cross-examination of this witness, "proved that public rumor imputed to said Stiff a bad moral character as to drinking, fighting, shooting at men, the murder of a man by the name of Gilbert, and certain publications, which were reputed false, in his newspaper."

The prisoner then asked the witness, upon a re-examination,

the following questions:—1st. What other moral delinquencies public rumor attributed to said Stiff? 2d. What does rumor say in regard to these publications? 3d. Whether the witness did not know of his own knowledge that they were false?

These questions, upon the objection of the State, were all excluded by the court.

A witness may be impeached by cross-examination, or by proof of general character by other witnesses. If the latter mode is resorted to, the witnesses cannot be inquired of as to particular facts, for no man can be supposed to come prepared to defend against such proof, and to elucidate and explain every transaction of his life which might be arrayed before the jury, and which, unexplained, might cast a stain or unfavorable imputation upon his character.

In the present case, however, the State brought out, upon cross-examination of the impeaching witness, the evidence of particular acts tending to impeach the character of Stiff. Why this was done, the bill of exceptions does not inform us. It may be, that they constituted the grounds of the impeaching witness' opinion that Stiff was not entitled to credit on his oath; but this does not appear, and the rule is, to construe the bill of exceptions most strongly against the party excepting. As the evidence is here recorded, it would seem that, after the witness Watt had been examined by the defendant touching Stiff's *general* character, the State, upon cross-examination, superadded proof that public rumor gave him a bad character as to several particulars, namely, as to his drinking, fighting, shooting at men, the murder of a man by the name of Gilbert, and certain publications, which were reputed false, as published in his newspaper. As to all these particulars, being new matter brought out upon the cross-examination of the State, it may be conceded the prisoner had the right to re-examine the witness. But it is very clear that the court had the right to confine the re-examination to matter strictly rebutting. He has no right to go farther, and to introduce matter new in itself, and not explanatory of that proven by his adversary's examination. Such was the opinion of seven out of the eight judges taken in the House of Lords in the Queen's case, as delivered by Lord Tenterden.—2 Brod. & Bing. 297; see 1 Green. Ev. § 468, § 469.

It is hardly necessary to say that the questions here excluded

called for new matter, opening up an investigation which might have consumed days on collateral matters, which, to say the least of them, had but a remote bearing upon the cause. If the court had no power or discretion to terminate such inquiries, they might become almost interminable; for, if on the re-examination new matter is elicited, the other side may with equal propriety insist upon re-examining as to that, and to bring out new matter in turn, and so on, *ad infinitum*.

We therefore think the court very properly rejected the questions, and terminated the examination where it did.

18. The same witness was asked by the counsel for the prisoner this question, "What did rumor say as to Stiff's general character before he came to Cedar Bluff?"

If we concede, what appears to be much controverted by the authorities, that the impeaching witnesses are not confined to proof of general character for *truth and veracity*, but to general character merely, still it is clear that this question was improper. It is an attempt to prove a man's general character at one place by what rumor said of it at a different place and time.—We know of no precedent which authorizes such proof, and it is certainly opposed to principle and legal analogies.

19. The proof offered to be made by Chisholm, that there were in the Circuit Court of Cherokee six indictments for libel against the witness Stiff, with a view of impeaching the latter, was properly excluded. We have seen that you may impeach a witness by general evidence only, and not by proof of particular facts; for, as to these, it is not presumed the party can come prepared to defend.—2 Russ. 7 Ed., p. 939 and note z.

20. We are wholly unable to perceive how the letter written for the prisoner by the witness Stiff to Mr. Hoge, or any part of it, can be allowed as evidence for the prisoner. If offered to impeach Stiff, it was improper under the principle last above asserted; and if offered as original testimony of the contents, it was clearly improper as being the declarations of the prisoner, or rather of Stiff made at his request, while they were in the jail together.

21. The proof offered to be made by the State that the prisoner, on the Sunday of the murder, in connection with Wm. H. Stiff, won money in playing at cards of one Vaughan, was proper. It was giving a history of the prisoner's acts during that

day, a matter which might throw light upon the transaction.—At all events, we cannot undertake to say, that it was so wholly foreign from the case as to be irrelevant. What we have said in the fourth paragraph of this opinion, in respect to Asa Allen's testimony, is equally applicable to this.

22. The interrogatories propounded upon cross-examination by the State, to Mrs. Shackleford and Miss Anthony, who were examined in chief on the part of the prisoner, clearly fall within the principles of law which we have asserted in the fifteenth paragraph of this opinion.

They sought to inform the jury as to the relation which existed between these witnesses and the prisoner, whether they were on terms of friendly intimacy—their means of knowing the facts to which they testified, and as to any bias or prejudice which might influence them. The same may be said of the cross-interrogatories to the witnesses Gaines, Cole and Counts; they do not exceed the bounds properly assigned to a cross-examination.

23. The interrogatory propounded by the counsel for the State on the cross-examination of Jane Matheny, a witness examined by the prisoner, and who stated that she had never been married, namely: "Have you any children?" was entirely competent, as tending to establish the fact of her being a prostitute. It is unnecessary for us to decide whether she was bound to answer the question, on the ground that it might tend to criminate her. This question is not before us. The question might properly be asked, although the witness might have claimed her privilege, and have been justified in refusing to answer it.—2 Russ. on Cr. (7 Ed.) 926-7, and notes.

The questions propounded to this witness, as to where her mother was the day Coggins swore she had shown him a shirt, and as to what she was doing the next day thereafter, and as to her declarations tending to show her intimacy with the prisoner, were proper, under the rules above laid down. The courts very properly allow much latitude in such cases, as it is not unfrequently the only means of exposing an unworthy witness.

24. The prisoner offered Edmund Bell, the county surveyor, as a witness, who proved that he had surveyed the grounds and distances about Centre, and the routes supposed to be connected with the prisoner's guilt, and exhibited a map of such

survey, showing the different routes and localities mentioned in the testimony. This diagram was proved to be correct in every particular, and was introduced on the part of the prisoner, at first, without objection from the State's counsel, who cross-examined the surveyor concerning it. The prisoner's counsel insisted that the jury should take it with them in their retirement to consider of their verdict; but, on objection by the State, the court refused to let the jury take it, upon the ground, as stated in the bill of exceptions, that there was no evidence that the prosecutor or any one representing the State was present when the said survey was made.

The rule is, that "a witness may use a plat, diagram or map, made in any way, to explain or make himself intelligible to a jury, though it cannot go to them as evidence."—1 Phil. Ev. (3 Ed.) 726, n. 376. It amounted to no more than if the witness had written down his testimony to aid his memory on the examination, and no one would contend that such memorandum, as a matter of right, could be taken by the jury. We will not say that the judge might not, in the exercise of his discretion, have permitted the jury to take it in their retirement, but he was not bound to do so; and although he may have predicated his refusal upon a wrong ground, we cannot say that he has exercised his discretion improperly. In other words, having a discretion, his act is not revisable on error.

25. The State offered Martin Hale to sustain the credit of Ed. Stiff. The prisoner, on cross-examination, proved by the witness that he had taken an active part in this prosecution, and that he cherished unfriendly feelings towards the prisoner. The State, upon re-examination of the witness as to the extent of his feelings of hostility to the prisoner, asked him "if his feelings towards Campbell were such as to desire to see an innocent man convicted?" To this question the prisoner objected, but the objection being overruled, the witness answered that he had no such desire.

We are unable to perceive any error in this. It was explanatory of the witness' state of feeling, which the cross-examination had brought out, and tended to show that, notwithstanding he was unfriendly to the prisoner, he did not desire to do him injustice by producing a conviction against the evidence.

26. The question propounded to Mr. Brindlee, on cross-

examination by the prisoner, "whether from general rumor it was not his opinion that Stiff was a cold-blooded murderer," and which the court rejected, requires no other response than that it called for the individual *opinion* of the witness, founded on rumor, respecting the guilt of Stiff as to the crime of murder. The bare statement of the proposition is sufficient to stamp the inquiry as wholly improper.

We have thus given to the numerous exceptions, taken upon the trial in the court below, a patient investigation. Many of them seem to call in question what we regard very simple propositions of law; but the importance of the case to the prisoner, and an earnest desire on the part of the court to see that no principle of law should be violated in his conviction, have induced us to consider every point which the record presents.

After the fullest consideration which it was possible for us to give the case, the court is unanimous in the opinion that there is no error in the record, and the sentence of conviction is consequently affirmed.

CARPENTER *vs.* THE STATE.

1. When a white man is indicted for an assault on a slave with intent to murder him, and, without demurring to the indictment or moving to quash it, goes to trial on the plea of not guilty, he may be convicted of assault and battery only; and he cannot afterwards, by assigning for error the verdict of the jury, raise the question whether an indictment lies against a white man for an assault on a slave with intent to murder.

ERROR to the Circuit Court of Macon.

Tried before the Hon. ROBERT DOUGHERTY.

HILLIARD & THORINGTON, for plaintiff in error.

P. T. SAYRE, for the Attorney General, *contra.*

PHELAN, J.—In this case, the appellant was indicted for an assault and battery, with intent to murder, upon one Jacob,

a slave, the property of one Joseph R. Hand. There was no demurrer to the indictment, nor motion to quash; but the defendant went to trial on the plea of not guilty. The jury returned a verdict, that they found the defendant "guilty of assault and battery" merely, and fined him $500; upon which judgment was rendered accordingly. The error now assigned is, the verdict of the jury.

The counsel for the appellant has argued the question whether an indictment will lie against a free white man for an assault and battery, with intent to murder, on a slave. This question is not presented by the state of the record, nor by the assignment of error. That a jury, under an indictment for assault and battery with intent &c., may find the defendant guilty of a common assault, or assault and battery, only, has been repeatedly decided. That was all that was done in this instance; and the verdict was accordingly conformable to the indictment, and proper. That a white man is liable to an indictment for assault and battery on a slave, is made the law of this State by statute, and, we suppose, is not denied. As the other question cannot arise on this record, we decline to consider it.

Let the judgment below be affirmed.

THE STATE EX REL. CLAUNCH *vs.* CASTLEBERRY.

1. When the defendant in a bastardy proceeding enters into a recognizance for his appearance at court, and his surety in the bond afterwards become judge of probate, the latter is incompetent by reason of interest to preside on the trial of the cause, and any proceedings therein had before him are *coram non judice* and void.
2. If a proceeding under the bastardy act was continued by the defendant at the first term to which he was bound to appear, the County Court had jurisdiction to compel him to enter into recognizance for his personal appearance from term to term and for his good behavior; and if the recognizance contained any superadded condition, it was void only as to that condition, and valid as to the remaining obligations.
3. When a judge of probate improperly refuses to transfer to the Circuit Court a cause in which he is personally interested, *mandamus* lies to compel its transfer.

ERROR to the Circuit Court of St. Clair.

Tried before the Hon. THOS. A. WALKER.

THIS was a proceeding in bastardy, commenced against Castleberry as the putative father of a bastard child, then likely to be born of Sarah Claunch.

The usual oath was taken by the prosecutrix, and a warrant was issued by one R. J. Allen, a justice of the peace, and a bond was duly entered into by the defendant, with John Collins and J. H. Castleberry as securities, conditioned for the appearance of defendant at the December term, 1849, of the County Court of St. Clair County, to abide the order and decree of the court in the premises.

The cause having been regularly brought before said County Court, at the December term, 1849, the defendant filed his affidavit for a continuance, which was granted him; but it was ordered by the court, that he be recognized in the sum of five hundred (dollars? this word is omitted,) with good and sufficient securities. Thereupon, the defendant, Wesley M. Collins and Irby Wooley, his securities, were duly recognized in open court in the above sum, to be void on condition that the defendant appear from day to day, and from term to term of said County Court, to abide and perform its order and decree &c.; and the cause coming up at the next term of the County Court, Wooley, one of the parties to the above recognizance, having in the mean time been appointed judge of the County Court of said county, the prosecutrix moved the said judge to transfer the cause to the Circuit Court, by reason of his interest, and consequent incompetency to try it; but the judge decided that he had no interest which incapacitated him to try the cause. The defendant, however, "to remove all doubt, offered to give a new bond and security, which was ordered by the court." Thereupon, the defendant, with R. W. Cobb, entered into a recognizance, for the appearance of defendant, and his performance of the order of the court, &c. To this ruling of the court an exception was saved, and the prosecutrix moved for a continuance, which was granted, upon condition that she would find security for the cost of suit, if finally adjudged against her. This she refused to give, withdrew her application, and refused to proceed in the cause; and there being no evidence offered against the defend-

ant, the court ordered him to be discharged, and adjudged that he should recover the cost of said Sarah Claunch, for which an execution should issue.

The prosecutrix then filed her petition before the Circuit Court, for a *mandamus* to issue to the County Court judge, (Wooley,) commanding him to transfer said cause, and setting forth his interest, as above shown by the record, as the reason for such transfer. The circuit judge, (Phelan,) upon an inspection of the record, decided, that the county judge was interested—that his action in the premises was *coram non judice* and void, and ordered the transfer.

At the succeeding March term of the Circuit Court, the papers having been returned by the county judge, the plaintiff announced a readiness to proceed with the cause; but two counsel, as friends of the court, suggested that the defendant was not before the court, never having been notified. The court ruled otherwise; and the record states that, "Defendant excepted to the ruling of the court, and then filed his demurrer to the petition for a *mandamus*, and on his application the cause was continued."

At the September term, 1851, "the parties came by their attorneys, and the plaintiff announced herself ready for trial, and thereupon the defendant moved the court for a continuance of the cause, and the facts stated in the application were admitted by the plaintiff; thereupon, the defendant demurred to the petition for the *mandamus* filed in this cause; the plaintiff objected to joining in the demurrer, and moved to strike it from the file. The court refused to strike out the demurrer, and compelled the plaintiff to join therein; thereupon argument being had, it was considered by the court, that the demurrer be sustained—that the defendant go hence, and recover of the plaintiff his cost &c., for which let execution issue, &c."

To reverse this decision and judgment of the Circuit Court, the plaintiff brings the case by writ of error to this court, and here assigns for error:

1. The judgment sustaining the demurrer.
2. In refusing to take cognizance of the cause.
3. In reversing the decision of the same court, made at a previous term.

The defendant in error moves to dismiss the writ of error for want of jurisdiction, and, if this motion fails, joins in error.

J. T. Morgan, for the plaintiff in error:

As to the jurisdiction of the judge of probate to proceed to final judgment in a case where he is interested.—See Caldwell, adm'r, v. Bell & Graham, 1 English's R. 227; 5 Barb. S. C. R. 607; Gay v. Minott, 3 Cushing's R. 352; 3 Comstock's R. 547; 4 vol. U. S. Digest, 112 § § 2 to 7.

A writ of error did not lie from a void judgment.

White & Parsons, *contra*:

Wooley, the judge of probate, was not interested in this case, within the meaning of the statutes: 1. Because the statutes do not authorize the judge of the County Court to take a bond "from the person accused." He can only perform such acts, and exercise such jurisdiction, as is conferred upon the court.—See Elliott v. Hall, 8 Ala. R. 508. Therefore the bond taken by the judge of the County Court at its December term, 1849, was void; and it being void, Wooley was not interested.

2. The condition of the bond exceeds the statutory condition, and, to that extent, is clearly void.—Howie & Morrison v. The State, 1 Ala. R. 113. The only statute which we have been able to find, authorizing a bond to be taken for the appearance of the defendant, confers this power on the justice before whom the proceedings are commenced.—Clay's Digest, 134 § 2. The condition of the bond authorized by this act, is performed, if the accused appear before the *next* County Court of the county, &c. The condition of the bond in this case is in the form of a recognizance. Conceding that the County Court might have taken such a bond as the justice was authorized to take, yet, so far as it departed from the authority, it was void.—Whitted v. Governor, 6 Porter 342; 5 Peters' R. 115.

The condition of such a bond as the justice was authorized to take being performed, by appearance and good behavior in the meantime, would relieve Wooley from all interest which could disqualify him from taking jurisdiction of the case. As to the degree of interest which disqualifies.—See 17 Conn. 542; 1 Denio R. 25; *ib.* 186; 12 Conn. 88.

CHILTON, C. J.—The law wisely withholds from every judge, all temptations to depart from the strict line of duty, from considerations of interest, by rendering him incompetent to

sit in any cause in which he is interested. The maxim is '*Nemo judex in causa propria*,' and it is alike founded in common sense, and a just desire to preserve from impurity the fountains of justice.

In Boyer v. Potts, 14 Serg. & Rawle 157, where the question came up, whether a justice of the peace, who had a demand to collect, had acted as agent for the party plaintiff, the court, *per* Gibson J., use the following language: "There was no evidence of any delegation of authority, except what was thought to result from the relations in which the parties stood, of magistrate and suitor; and the law, certainly, will not from this presume an agency so fraudulent and base. Justices of the peace, no doubt, frequently act as agents for those who employ them; but they ought to know, that they do so at the peril of being convicted of a highly aggravated misdemeanor, which is indictable at common law. Ignorance cannot palliate a crime of this sort; for the turpitude of acting both as judge and party in the same cause cannot but be obvious to the dullest comprehension."

The earlier common law reports abound with authorities upon this point.—Style 138; 1 Vent. 3; Hardress 503; Hob. 87; Salkeld 396, where Holt, C. J. said: "The Mayor of Hereford was laid by the heels, for sitting in judgment in a cause where he himself was lessor of the plaintiff in ejectment, though he, by the charter, was sole judge of the court." So, in the Earl of Derby's case, 12 Co. 114, it was resolved, that the chamberlain of Chester, "being sole judge of equity, cannot decree any thing, wherein himself is a party; for he cannot be a judge in his own cause; and this fundamental principle is adhered to with such pertinacity, that it has been held, that no practice to the contrary shall be allowed to overturn it.—2 Str. 1173; 5 M. & S. 513. Indeed, Lord Coke, in Doctor Bonham's case, 8 Co. 118, clearly intimates that an act of parliament contravening it would be void, as against common right.—See also 12 Mod. 687; 4 Term R. 71.

I am not unapprised of the fact, that, in an opinion delivered some four years since by Lord Langdale, Master of the Rolls, in the case of the Grand Junction Canal Company v. Dimes, 12 Beavan 63, a qualification, or rather an exception, to the common law rule which we have mentioned, was held to obtain in a case where the judge's refusal to act in the cause would amount to a denial of justice, as it was said.

In that case, the plaintiff had filed a bill in the Vice Chancellor's of England court, to enjoin the defendant from obtaining possession of certain land, claimed by the company upon equitable circumstances not necessary now to be named. The case was heard before the V. Chancellor, and resulted in favor of the company, and was re-heard before Lord Chancellor Cottenham, and by him affirmed. Dimes, the defendant, afterwards discovered that the Lord Chancellor, at the time he made the decision, owned ninety shares of stock in the company, and proceeding upon the ground that the re-hearing was *coram non judice* and void, gave notice of motion before the Lord Chancellor to discharge the order made by him on the re-hearing, and to order the cost which he had paid to be restored to him; that the petition for re-hearing be restored to his Lordship's paper of re-hearings and appeals, and that the proper directions be given by issuing commissions or otherwise, for the trial of the appeal before the Master of the Rolls, assisted by two of the common law judges at Westminster.

The Master of the Rolls, at the request of the Lord Chancellor, heard the motion, and overruled it, at the same time recognizing the validity and importance of the general rule, that no one could be a judge in a cause in which he was interested; yet he maintained that there might arise cases where there would be a failure of justice from the refusal of a judge to sit, and this he considered a greater evil than the departure from the fundamental rule. This view is predicated upon a *dictum* in Great Charte v. Kennington, 2 Stra. 1173; but is certainly opposed to all the adjudged cases both in this country and in England, so far as my researches extend.

The departure from the rule, while it might meet the justice of the particular case, might poison and tend to corrupt the very fountains of it in its general administration. It were greatly better, in my opinion, to leave such cases to be provided for by legislative enactment, than to make shipwreck of principle to meet them. But, as the case before us calls for no opinion upon the point involved in that decided by the Master of the Rolls, it is left by this court an open question.

Aside, however, from the provisions of the common law, our statute meets such cases, and declares "that no judge of probate shall act upon the determination of any cause or proceed-

ing, or take jurisdiction of any matter, in which he is interested, or related to either party, by consanguinity or affinity, or in which he shall have been counsel, executor, administrator or guardian, unless by consent of the parties concerned; but in such cases, the cause or proceedings shall be commenced, or transferred, as the case may be, to the Circuit Court of the proper county, and said court shall take jurisdiction and proceed therein as the Probate Court might have done."—Acts of 1849-'50 p. 36 § 40.

To constitute such interest as will disqualify the judge, within the meaning of this section, from proceeding, it is not necessary that he should be a party. It is sufficient if he is in anywise interested in the subject matter.

Our statute is not unlike that of Pennsylvania upon the same subject; and in that State it was held, that, "where the judge of probate had a valid claim against the estate of a deceased person, but had determined in his own mind not to enforce it, and exercised jurisdiction over the estate by granting letters of administration, he was interested as a creditor of the estate, and the grant of administration was void for want of jurisdiction; and that it was not rendered valid by the circumstance that no exception was taken to his jurisdiction."—See Sigourney v. Sibley, 21 Pick. Rep. 101; See also 5 Barb. Sup. Ct. Rep. 607; 3 Cush. Rep. 352; 3 Coms. Rep. 547; 2 Toul. L. Dic. 285.

These authorities may suffice to show that, if the recognizance was not void upon which Judge Wooley was bound, he was interested, and all his action in the premises was *coram non judice* and void.

We come, then, to the inquiry, was the recognizance binding upon him?

The statute declares that the County Court, at the next term to which the justice is required to bind the party to appear, "shall have full and complete cognizance and jurisdiction of said charge of bastardy." Now it is most improbable that the legislature intended the County Court should be ousted of its jurisdiction, in the event the defendant was not tried at the first court, for this construction would deny the parties concerned the right, under any circumstances, to a continuance. If, however, the court has power over the cause to continue it, and has no

power to secure the attendance of the defendant, so as to make him amenable to its judgment, the object which the legislature had in view, in requiring the justice to take a bond with security, conditioned for his appearance at the next County Court, and in the mean time to be of good behaviour, entirely fails; for, if the bond taken by the justice extends beyond the first court to which it is returned, the securities may have failed, so as to make it worthless.

We are of opinion, however, that it was competent for the County Court to take a recognizance from the party, as necessary to carry out the intention of the legislature, and as incident to the plenary jurisdiction conferred on it over the subject matter. The condition of the recognizance should not, however, go beyond the securing of the defendant's personal appearance and for his good behaviour. His appearance was necessary to enable the court to carry out and render effectual its jurisdiction, in compelling him to enter into bond for the payment of the provision to be made for the support &c., of the bastard, as provided in the fourth section, (Clay's Dig. p. 134) and hence is deducible from the statute. As to his good behaviour, the judge, being a conservator of the peace, might well superadd this condition.

But the obligation before us is to appear "from day to day and from term to term," and to abide the final determination of the court. So far as it secures the appearance of the defendant we think it is good, and the court had power to take it.—See 18 Vin. Abr. 163 *et seq.*; 1 Chitty's Cr. L. 90; Jac. L. Dic. "Recognizance." If the superadded condition creates any additional obligation, it is void, but the recognizance is valid as to the remaining obligation.—Hanna v. The State, 1 Ala. Rep. 110.

We conclude that the recognizance was not void—that it was well taken for the appearance of the party from term to term, and consequently Judge Wesley had such interest as to render him incompetent to preside at the trial. His action in the matter being void for want of jurisdiction, it follows that the circuit judge committed an error in repudiating the cause upon demurrer to the petition.

We entertain no doubt but that a *mandamus* was the proper remedy to compel the transfer of the cause. In judgment of

law, the cause was still pending in the Orphan's Court, its decision being a nullity.

Let the judgment be reversed, and the cause remanded.

Ex Parte WHITEHEAD.

1. When a debtor who is held to bail endeavors to procure his discharge under the insolvent laws, by rendering a schedule of his property, and takes an appeal to the Circuit Court under the provisions of section 2185 of the Code, he is entitled to be discharged from custody on giving the bond required by that section.

Petition by John Whitehead for the writ of *Habeas corpus* and such other remedial process as may be necessary to obtain his discharge for an alleged illegal confinement in the jail of Choctaw County.

CHILTON, C. J.—This is an application by Whitehead to be discharged on *habeas corpus* from an alleged illegal confinement in the jail of Choctaw County, on proceedings had against him under the insolvent laws.

It appears that an application for a discharge was made before His Honor C. W. Rapier, one of the circuit judges, by *habeas corpus* tried before him, and was refused, the judge holding, as appears from the facts certified by him to this court, that the giving of the bond authorized by section 2185 of the Code, which provides that the party may appeal to the Circuit Court upon entering into bond with security, &c., conditioned that the defendant will appear at such court and abide its judgment, did not justify the defendant's enlargement.

In our opinion, this is not a correct construction of that section of the Code; but we think it was intended that, upon entering into such bond, the defendant should be discharged, upon the security which it furnishes.

Let a writ of *certiorari* and also a writ of *habeas corpus* issue

to bring the record and the prisoner before us, unless, under the opinion as above expressed upon the *prima facie* case as presented by the petition, the circuit judge, or other officer having cognizance of the case, shall discharge the prisoner.

Ex Parte MORGAN SMITH.

1. The Supreme Court has a discretionary power to grant writs of prohibition to all the inferior courts of the State; but the writ should never be granted, except in cases where the inferior court has clearly exceeded its jurisdiction in the order complained of, and the relator has no other remedy to which he can resort for his protection.
2. An interlocutory order of the Chancellor, directing "*that a receiver be appointed* to take possession" of the defendant's estate, "and that he and either of the parties have leave to apply to the court for any other or further directions, as to him may be necessary; *and that it be referred to the register, to appoint a fit and proper person to be the receiver aforesaid*, the person so to be appointed first giving bond," &c., and directing the defendant to deliver up to him his plantation, &c., is a nullity, and the writ of prohibition should go from the Supreme Court to revoke it, and prevent proceedings under it. (*Per* Justices Ligon, Goldthwaite and Phelan.)

(Chilton, C. J., and Gibbons, J., *dissenting*, held that the order was only, at most, an erroneous construction of the statute; that the relator should have first applied to the Chancellor, by petition, for a correction or modification of the order; and that, as the Chancellor had jurisdiction of the case made by the bill, and a discretion as to the appointment of a receiver, and had erred merely in the manner of making the appointment, the writ should not be granted.)

This was an application for a writ of prohibition, or any other remedial process within the jurisdiction of this court to grant, for the purpose of arresting certain proceedings had upon the order of the Hon. J. W. Lesesne, Chancellor, in vacation, upon a bill filed by Sarah O. Smith against her husband Morgan Smith, the relator, in the matter of appointing a receiver.

The bill, among many charges which it is unnecessary for the purposes of this investigation to notice, substantially alleges that the complainant was married to the said Morgan Smith in the year 1824; that, in 1846, he committed adultery, with one

of his own negro women, called Ides; that having detected him in the act, he threatened complainant with personal violence, and pursued her out of the room until she sought refuge in the protection of her son; that she left his house at that time, which was the 25th day of October, 1846, and did not return until December of that year, he promising to reform his habits of intoxication, which she believed to be the cause of his infidelity and other bad conduct, and she agreeing, upon such reformation, to forgive the past and to be reconciled to him; but they occupied separate chambers, and lived without conjugal intercourse. The bill then sets out further efforts to reclaim her husband, all which proved abortive, until, by his repeated acts of unkindness and harsh treatment, and on one occasion of actual violence, in June, 1848, she was compelled to separate from him, since which time they have had no intercourse as man and wife.

That laboring under fears of personal violence, occasioned by his conduct and threats which he repeatedly made, the complainant in March, 1852, caused a bill to be prepared for a divorce from the bonds of matrimony, and for alimony, against her said husband; but, to avoid making public her domestic troubles, it was deemed best to advise her husband of her claim for a separate maintenance, and of her intended application by bill, which was accordingly done, and on the 29th March, 1852, he agreed to settle on a trustee, for the sole and separate use of the complainant, one half of all his real and personal estate; and on that day he executed a deed for that purpose, which is made an exhibit to the bill, by which said Morgan grants and conveys to Frank J. Smith, one half of all his real and personal estate of every description, to have, hold, &c. for the sole and separate use of complainant and her heirs forever.

In said instrument it is provided, that, as soon as convenient, and at all events by the first day of January then next, a division of the estate of said Morgan should be made in quantity and value, so as to separate the portion thereby granted to the trustee; and said Morgan bound himself, that, on said division, he would execute a deed to the trustee for the part assigned him, on the same trusts specified in this deed; also, that on said division, the slaves formerly belonging to the wife should be included in her part, if practicable. The deed then prescribes the

manner, and designates the persons who are to make the division, appointing three individuals to make it, any two of whom may act.

One of the persons so appointed having departed this life, the other two, with suitable assistance, went to the house of said Smith on the 28th December, 1852, and divided the slaves and the land; but the other personal property remaining undivided, it was suggested, that it would be better to postpone the division of that until the close of the year, when a division of that also should be made, and thereupon it was consented that, instead of working their hands on their separate tracts, they should continue to work them in common on both tracts, and make a crop for the year 1853, employing also the undivided personal property.

At the time of this division, the said Morgan Smith executed a deed for the land, embracing some eighteen hundred acres, and between seventy and eighty slaves, being the shares allotted to his wife, conveying the same to Frank J. Smith in trust for the sole and separate use of Mrs. Smith, and providing, as the consideration of the deed, that the same should be in lieu of dower and all interest in his estate on the part of Mrs. Smith, and that he should not be made chargeable with any debts contracted by her. This deed bears date the 29th December, 1852, and is made an exhibit to the bill.

Cotemporaneous with the execution of the above deed, another instrument was entered into between said Morgan Smith and the trustee, whereby, after reciting the two deeds above named, it is provided and agreed "to postpone the division of the other personalty until the 1st day of December, 1853, or as soon thereafter as practicable," and to employ the slaves, horses, mules, stock, &c. &c. owned by the parties severally, as well as the property undivided, upon the land owned by them in common, and to make a crop for the year 1853, and to divide equally the proceeds of the crop so raised.

Afterwards, on the 17th day of June, 1853, said Sarah O. Smith executed to her husband what purports to be a relinquishment of her dower and a release of all claim to any portion of his estate, in consideration of the provision made for her by the deeds aforesaid, executed by her husband. All which deeds and agreements form exhibits to the bill.

The bill charges, that the dwelling house, negro cabins, &c. fell to her in the division of the land; that her object was, in preparing her first bill, to obtain the means of living apart from her said husband, free from the annoyance of his abuse and presence, brutalized, as she charges him to be, with intemperance, and believing that she had secured to her a home where she might so live, and that the same was her separate property, she went in January, 1853, to the dwelling house and took up her residence there. On the morning of her arrival, her husband not being present, she took possession of the keys. He came in the night of that day; took from her the keys, and on her protesting against his interference, as it was her house, and her saying there should be no liquor kept there, he pulled her nose, spit in her face, and went towards the place where the guns were kept, swearing he would kill, &c.

The bill abounds with such charges of abuse and threats, and of the defendant's drunkenness, and substantially avers that he is mismanaging the farm and negroes, committing waste in cutting the timber from complainant's portion of the land, and causelessly turning off overseers who threaten to sue for their wages; that she verily believes, in his phrenzy from drunkenness, he will, in order to annoy, and distress her, causelessly punish and ill treat her negroes, and take the life and seriously injure some of them; that serious loss and injury have occurred to the negroes from his giving them medicine when he was intoxicated; that on this subject of administering medicines to the slaves he is a monomaniac, and no entreaty or persuasion can induce him to desist; that by his cruel treatment to her, she has been driven from her own house, and she cannot, she believes, live there safely, except under the protection of the Chancellor; that the trustee, not desiring to come in conflict with his father, refuses to maintain her sole possession of her house, and that she is without remedy except in the Chancery Court; that she proposed to him to work their separate hands on the lands belonging to each, and to employ separate overseers, and at the end of the year to divide the crop, according to their agreement, but he refused; that he has not accounted for the past year's crop, or paid any portion of the same; that from his habits of intoxication, and state of mind produced thereby, the said defendant is incapable of superintending the management of the plantation

and negroes, or of selling and taking proper care of the proceeds of the crops, and she fears that great injury will be done to her interest, unless the court will interfere for her protection. She also charges, on information, that, at the date of the first deed, said Morgan Smith had about ten thousand dollars in money, and bonds and notes and other evidences of debt amounting to twenty-five hundred dollars, subject to division, but which he fails to account for.

The complainant prays an injunction against said Morgan, "enjoining him from entering the dwelling house of the complainant as described in the deed, or the yard of said dwelling, or from approaching near enough to the said house to speak to her while she is there, or from cursing or speaking to her in a harsh or abusive manner, or in abusive language, or from annoying, harrassing or disturbing her in any other manner, or trespassing upon her, until the further order of this court; and that he be enjoined from cutting down any of the timber on the land of the complainant in the bill described, or removing any of the timber cut down by him on said land, or any of the rails made of timber cut on said land, or from using any of the house logs and poles cut down by him, or which may have been hauled by him from her lands to his own tract, until the further order of the court; also, prays that a receiver be appointed, to take possession of the plantation and negroes, horses, mules, stock, provisions, and every thing necessary to carry on the planting operations, with directions to make the crops, and to dispose of the cotton, and with such further directions as may be necessary to protect the rights of the complainant, and that said Morgan Smith be enjoined from interfering in any wise with the receiver in the management or control of the same; also prays an account of the crop raised in 1852, and of the money and choses in action owned by Smith at the time of the first agreement, namely, the 29th March, 1852, and which is subject to division in virtue of said agreement, and that an account be taken of the value of the timber which said Morgan has cut down from the lands of complainant, all which, she prays, may be decreed to her trustee, Frank J. Smith, for her sole and separate use. The bill concludes with a prayer for a divorce *a mensa et thoro*, and for general relief, and makes the trustee, Frank J. Smith, and Morgan Smith, parties defendants.

The bill was sworn to by Mrs. Smith, and exhibited to the Chancellor (Lesesne) on the 21st June, 1853, who made a *fiat*, that, on complainant's next friend entering into bond, with approved security, in the sum of twenty thousand dollars, payable to the register of the Chancery Court, and conditioned to pay all damages which the defendant Morgan Smith might sustain by the suing out the injunctions prayed for, if the same should be dissolved, then that injunctions issue according to the prayer of the bill.

The bond required by the *fiat* was given, and the register issued an injunction accordingly, on the 24th June, 1853.

On the same day, the solicitors for the complainant caused a written notice to be served upon the defendant, Morgan Smith, informing him that on the next day (June the 25th) the complainant would move the Chancellor, then holding the Chancery Court in Montgomery, for the appointment of a receiver to take possession of the plantation and premises in the bill described, and then in possession of said defendant, and also of all the negroes, stock, &c. &c., employed upon said premises in carrying on the farming operations; and that she would ask for directions to such receiver, as to making the crops and disposing of the cotton, and upon his appointment, for an injunction against Smith's interference in any way with his possession, management or control of the trust so delegated by the Chancellor.—This notice stated that the grounds of the application were to be found in the bill filed by the complainant, supported by affidavits.

On the day appointed, the parties appeared before the Chancellor, by their solicitors, and the cause was postponed until the 27th, when the Chancellor proceeded to the consideration of the motion.

The defendant desired further time in order to file his answer, that he might read it upon the hearing of the motion for a receiver, and made affidavit that his answer would amount to a denial on oath of all the equities of the bill. In order to avoid further delay, it was consented by the complainant that the answer of the defendant should be considered as filed and as read upon the trial, and that the Chancellor should regard it as denying all the equities of the bill. Thereupon, the complainant read a copy of her bill, as certified by the register of Lowndes

County, and submitted the affidavits of Frank. J. Smith, Joseph R. Morefield and John Christie. It appeared that these affidavits had been submitted to the solicitors for the defendant; but the defendant had no notice otherwise of the names of the persons whose affidavits would be used on the trial. The defendant's solicitors moved to reject the affidavits, upon the ground: 1st, that they could not properly be read on such an application, and 2nd, that the defendant should have been notified of the names of the persons whose affidavits would be relied upon, when he was informed of the motion. These objections were overruled by the Chancellor, and the affidavits were ordered to be filed as part of the record in the cause. Thereupon, the Chancellor ordered that "a receiver be appointed to take possession of the plantation, negroes, horses, mules, stock and provisions, mentioned in the bill and for which a receiver is therein prayed, and also to take charge of every thing on the plantation necessary to carry on the plantation operations, and that said receiver proceed to make and gather the crops, and dispose of the cotton when ready for market, and that he and either of the parties have leave to apply to the court for any other or further directions to him as may be necessary; and that it be referred to the register of the Chancery Court at Hayneville to appoint a fit and proper person to be the receiver aforesaid of said property and crops: the person so to be appointed first giving bond in the sum of twenty-five thousand dollars, to be approved by the register, duly to account for and pay over what moneys he may receive therefrom, and account for and deliver the property so received by him, according to the order and direction of the court." And it was ordered that the defendant, Morgan Smith, deliver to such receiver, when so appointed, the possession of said plantation and negroes, and other personalty above mentioned. To this order the defendant objected, and prayed an appeal to this court, which was allowed upon his giving security for the cost of this court within sixty days.

On the 28th day of June, it appears that E. H. Herbert, the register of the Chancery Court at Hayneville, in Lowndes County, in obedience to the order of the Chancellor, appointed Frank J. Smith, who, he says in the order of appointment, was proposed by the complainant's solicitors, and with whom he

was well acquainted, and he had upon inquiry of others also ascertained that he was a fit and proper person for said office, and the said receiver entered into the required bond with security, which bond was by him approved.

It is deemed needless to set out the affidavits; they fully sustain the principal allegations of the bill.

BELSER & RICE and N. HARRIS, for the relator:

1. No person shall be deprived of life, liberty or property without due process of law.—5 Amendment Const. U. S. § 10 Bill of Rights of Ala.

2. The Supreme Court of Alabama has power to issue any "remedial" or "original" writ, which may be necessary to give it a *general superintendence* and *control* of inferior jurisdictions. The phrase "inferior jurisdictions" here used, includes every chancellor, chancery court, circuit judge and circuit court in Alabama, as well as courts and magistrates whose powers are still more circumscribed.—Const. Art. 5 § 2.

3. There can be no doubt of the power of the Supreme Court to issue a writ of prohibition or *mandamus*, or any other remedial or original writ, to a Chancery Court or to a Chancellor.—Glasscock v. Johnston, 2 Ala. Rep. 519; The State *ex rel.* Att'y Gen. v. Porter, 1 Ala. Rep. 688.

4. It is not only the right of the Supreme Court to issue such writs, but its plain constitutional duty, wherever the issuance of such a writ becomes "necessary to give it a general superintendence and control" of any jurisdiction in the State "inferior" to the Supreme Court. Every exercise of lawless or unauthorized power by any inferior jurisdiction in this State, is subject to the "control" of the Supreme Court.

5. The new Code of Alabama, § 2986, declares, that "receivers can *only* be *appointed* by *the Chancellor*."

It is well settlled, that a judicial officer cannot delegate to another the power and authority by law entrusted to him.—Butler v. Foster, 14 Ala. Rep. 323; Rex v. Croke, 1 Cowper's R. 26; Perkins v. Reed, 14 Ala. Rep. 536.

The Chancellor does *not* in this case *appoint a receiver*, but orders that "a receiver be appointed," and "that it be referred to *the register* of said Chancery Court at Hayneville *to appoint* a fit and proper person to be the receiver aforesaid of the said

property and crops," &c. This order is made in vacation, in Montgomery County, on the 27th June, 1853; and "in vacation, June 28th, 1853," the said register at Hayneville, under color of said order, appointed Frank J. Smith the receiver! The said order of the Chancellor directed the register to take a bond with security, in the sum of $25000, duly to account &c. from the person who might be appointed receiver by said register, and a bond was taken by the register. The said order of the Chancellor was, that the said Morgan Smith (the relator) "deliver to such receiver, when so appointed, the possession of said" real and personal estate. The relator objected and excepted to each of the rulings of the Chancellor in the premises.

One half of the property consisting of lands, a plantation with a growing crop thereon, slaves and other personalty, is admitted by the bill itself to be the exclusive property of the relator, upon which the complainant has *no claim nor lien* whatever, either legal or equitable! The relator has no other lands or slaves, except such as are embraced by the bill and order that the receiver be appointed. Although a man of wealth, he is by this order of the Chancellor, and appointment of a receiver, deprived of *the control and possession of all his estate.*

Now, for the sake of argument, let it be conceded that the Chancellor *had jurisdiction of the case made by the bill.* The concession does not touch *one of the great points* involved in the present application. That point is, that the Chancellor had *no jurisdiction, no power, to delegate to the register the appointment of a receiver, nor* to order the relator to deliver to the receiver, "when so appointed," all his (the relator's) lands and slaves and other personalty.—3 Black. Com. 112-113; 8 Bacon's Abr. 230-228; Rowland v. Hockenhulle, 1 Ld. Raym. 698; Gould v. Gupper, 5 East's Rep. 365. However much of equity there may be in the bill—however undoubted may be the jurisdiction of the Chancellor over the case made by the bill, it is clear that his order, delegating to the register the appointment of the receiver, is utterly *void.*—14 Ala. Rep. 323, 536, *supra.*

Now shall that void order, and the proceedings had under color of it, stand until the final hearing of the bill? Shall the receiver appointed under it, hold the property until some final order or decree is made, from which an appeal will lie? Shall the relator be told, by the highest judicial tribunal in the State, "If the

order was valid, we *could not* interfere; but as it is void, we *will not*; you must resist and disobey the order, and defy the Chancellor and the receiver, or you may bring your actions of trespass against all who take your property under the order. Is such the "*control*" over inferior jurisdictions, which the constitution has enjoined upon the Supreme Court?

The bond taken of the receiver is no security. It is void.—Jackson v. The Governor, 15 Ala. Rep. 703.

"Every person, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or *delay*."—§ 14, Bill of Rights of Ala.

The relator has been injured by the appointment of a receiver, as above shown. His legal rights have been taken from him. He is entitled to a "remedy," and "without delay." The remedy, of course, must be an adequate one. The question then is, what is the remedy? An appeal will not lie. Writs of error are abolished. The remedy must be a *certiorari*, a *mandamus* or prohibition. And we think a prohibition is the adequate and appropriate remedy, because, if in the proceedings of the Chancellor, he has done some unlawful acts and some lawful acts, this court in issuing the prohibition may lawfully distinguish between such lawful and unlawful acts, and prohibit only the unlawful acts.—8 Bacon's Abr. 218, 227. Or, if *part only* be without the jurisdiction of the Chancellor, this court may issue the prohibition as to all.—1 Ld. Raym. 798, and 8 Bacon's Abr., *supra*; 3 Dallas Rep. Whatever may be the proper writ, this court ought to issue. The relator applies for the proper writ, whatever it may be.

6. The Chancellor himself had no power, in this case, to appoint a receiver. This is not a case for a receiver.

The bill cannot be sustained as a bill for divorce *a mensa et thoro*, because the husband had, by voluntary agreement, permanently separated, and full provision had been made for her by her husband, which she had accepted. Regarding the bill as a bill for divorce *a mensa et thoro*, it would not authorize the Chancellor either to issue an injunction or appoint a receiver.—New Code, § 1970, 1980.

The bill is not authorized by sections 1994 or 1998 of the New Code, which two sections constitute the *only authority* in

Alabama (except the sections in divorce cases above cited) for a married woman to invoke the aid of chancery for the protection of her *separate estate*, or for protection of herself out of the husband's estate against his improvidence or intemperance.

7. This is not even a case for an injunction. If every thing stated in the bill be true, there is a plain, adequate and complete remedy at law for every grievance therein alleged. The trustee's name could be used in suits at law, even if he were opposed to its use.—Roden v. Murphy, 10 Ala. R.; State v. Mitchell, 2 Bailey's Rep. 228; Lehman v. Logan, 7 Ire. Eq. Rep. 296; Howell v. Howell, 5 Ire. Eq. Rep. 258.

The bill in this case is an effort to transfer to the Chancery Court matters of exclusive legal cognizance.—Montg. & W. P. R. R. Co. v. Walton, 14 Ala. Rep.; Howell v. Howell, 5 Iredell's Equity Rep. 258.

JOHN A. ELMORE and THOS. H. WATTS, *contra*:

1. The bill has equity on three grounds, viz: 1. The adultery charged. 2. The cruel treatment.—Moyler v. Moyler, 11 Ala. 620; Hughes v. Hughes, 19 Ala. 307. 3. The waste of the joint property, that is, of the crops and of the property of which there was a joint control.

2. By the agreement of 28th December, 1852, Morgan Smith acquired an interest in and control over the property, real and personal, of his wife, jointly with the trustee, and he and his wife are tenants in common of the individual property and of the crops; and his management of this property is not the subject of an action at law. If it were, the trustee has refused to do anything. But from the nature of this management, it is shown that the injury will be irreparable.

3. The appointment of a receiver was within the power of the Chancellor, and it was properly exercised.

The selection of the person to act as such was referred to the register. This is a usual and proper course.—1 Smith's Chancery Practice, 631, 685; 3 Daniel's Ch. Pr. p. 1976; Code of Ala. § 2986.

4. The nature of the writ of prohibition is to stop all proceedings in the cause.—8 Bacon's Ab. Title Prohibition, 206; 3 Blackstone's Com. 112–3.

5. In England, this power was never exercised, except in the

following cases: 1. When inferior courts of *limited* jurisdiction took cognizance of a matter not within their jurisdiction. 2. When, in the course of their proceedings on some matter arising incidentally, they exceeded their jurisdiction. 3. When such courts act contrary to the rules of evidence according to the common law, when these rules of evidence should prevail. 4. When they try a matter contrary to the course of the common law, which should have been tried by the common law. 5. When they misconstrue an act of parliament. And all these cases, we insist, fall in fact under the general head of an excess of jurisdiction.—Grant v. Gould, 2 H. Black. 101, 104; Gould v. Gapper, 5 East 345; Ld. Camden v. Home, 4 Term 382; Home v. Ld. Camden, 2 H. Black. 533; 3 Blackstone's Com. (see also note 29) 112, 113, 114; Bacon's Ab. 8 vol. 206; Burger v. Carter, 1 McMullan 418.

6. The propriety and even power to issue such writs, in any other cases than where the inferior courts exceed their jurisdiction, has been questioned and denied in the English courts in some cases.—Hill v. Good, Vaughan Rep. 304: Harrison v. Burwell, Vaughan Rep. 206; Lord Camden v. Home, (Buller, J.,) 4 Term 398, 399. To the same effect are the opinions of Ashurst, J. and Grose, J. in the same case.—Home v. Lord Camden, 2 H. Black. 535-6-7; Gould v. Gapper, 5 East 365; Brymer v. Atkins, 1 H. Black. 164; Grant v. Gould, 2 H. Black. 101.

7. In other than cases where the record shows the excess of jurisdiction, the party complaining must have insisted on, or objected to, the matter the determination of which by the court is the matter of complaint.—Cases *supra*.

8. Mere irregularities in the proceedings of such inferior courts, according to their own law, do not warrant a prohibition, unless they interfere with some right or benefit given by the statute or common law.—Home v. Ld. Camden, 2 H. Black. 539.

9. From the character of the inferior courts where these questions arose, and from the cases and the reasoning of the court, it is plainly inferrable that such writs were not allowed to *inferior* courts of *limited* jurisdiction whose proceedings were according to the course of the general common law of the land.

10. It is not granted to a want of chancery, when the subject

matter is within its jurisdiction.—*Ex Parte* Cowen, 3 B. & Alderson, 123.

11. The current of authorities in the United States show that, when the subject matter is within the cognizance of the court, a prohibition will not be allowed.—Adams v. Hopkins, Dudly 107; *Ex Parte* Gordon, 2 Hill N. Y. 363; People v. Seward, 7 Wendell 518; Arnold v. Shields, 5 Dana 18; People v. Judges, &c., 20 Wendell 658; *Ex Parte* Blackburn, 5 Arkansas 21; *Ex Parte* Williams, 4 Arkansas 537; Leonard's Case, 3 Richardson 111; Clayton v. Heidleberg, 9 S. & Mar. 623; State v. Mahely, 2 Nott & McCord 410; Gray v. Court, &c., 3 McCord 175; State v. Whyte, 2 N. & McCord 174; McDonald v. Elps, 1 Nott & McCord 501; State v. Redjell, 2 Bailey 560.

12. What is meant by jurisdiction is, not that on the case made the court will not afford relief, but from the nature of the case as shown by the record, the court cannot undertake to decide whether the party shall have relief or not. This depends on the nature of the case itself, or of the proceeding.

13. The powers of the Supreme Court under the constitution to issue writs, have been defined to be for the purpose of giving to this court a general superintendence and control of inferior jurisdictions; and this is said to be "when some court, or some judge of a court, invested with authority to act in the premises, has undertaken to decide upon the case of a party aggrieved, or without just cause has refused to entertain the same.—*Ex Parte* Simonton, 9 Porter 383.

CHILTON, C. J.—By the second section of the fifth article of the constitution of this State, it is declared that, "The Supreme Court, except in cases otherwise directed by this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, under such restrictions and regulations, not repugnant to this constitution, as may from time to time be prescribed by law; *Provided*, that the Supreme Court shall have power to issue writs of injunction, *mandamus*, *quo warranto*, *habeas corpus*, and such other remedial and original writs as may be necessary to give it a general superintendence and control of inferior jurisdictions."

It is insisted by the counsel who have argued in favor of the

application, that it is the duty of the court, under the above provision of the constitution, to interpose and arrest the further action of the Chancellor in reference to the property mentioned in the bill, and to restore to the defendant the possession and control thereof, which, they allege, have been illegally taken from him. They maintain that, under the facts, as shown by the record, the writ of prohibition lies; but that, if it does not, this court should send out some other writ, or even frame a new writ, so as to effect that object.

I entertain no doubt as to the power and authority of this court, in a proper case, to restrain by writ of prohibition the unauthorized action or proceedings of the inferior courts. The question in the present case is, whether the record accompanying the application presents such a state of facts as will justify the resort to such extraordinary process.

According to the course of the common law, the writ of prohibition lies, where a party is drawn *ad aliud examen* by a jurisdiction or manner of process disallowed by the laws of the land; or, where in handling matters clearly within their cognizance, the inferior courts transgress the bounds prescribed to them by the law.—3 Bl. Com. 112. If the inferior court rightfully has jurisdiction, and in its proceedings commits errors, this is not the remedy for their correction.—The People v. Seward, 7 Wend. 518; 8 Bacon's Abr., by Bouv., 210.

It seems, also, now to be well settled in England, although it was formerly questioned, that the awarding of a prohibition is a matter discretionary, that is, "from the circumstances of the case, the superior courts are at liberty to exercise a legal discretion herein, but not an arbitrary one, in refusing prohibitions where in such like cases they have been granted, or where by the laws and statutes of the realm they ought to be granted."—8 Bacon's Abr., title Prohibition, B., and the authorities there cited. The same doctrine is well sustained by the American cases.—Gray v. Court of Magistrates and Freeholders, 3 McCord 175-77; The State v. John Hudnall *et al.*, 2 Nott & McCord 419-23; *Ex parte* Brandtacht, 2 Hill's N. Y. Rep. 367-9.

The case has been elaborately argued upon the merits, as presented by the bill, and it is strenuously contended, on the part of the relator, that the bill has no equity; that it prays a temporary divorce, and at the same time shows that the parties

are separated by mutual consent, the husband having made most ample provision for the wife; that the waste upon the land, the injury both past as well as that anticipated to the slaves, as also the threatened danger of personal violence to the complainant, are all matters for which the law provides an adequate remedy, and consequently that the Court of Chancery has no jurisdiction to afford relief.

It is perfectly clear that, upon this investigation, it would be improper to go into a critical examination of the equity contained in this bill. The only question before us is, do the facts charged present such a case as shows that the matter before the Chancellor was *coram non judice*; and as to this, we are not allowed to entertain a doubt.

The Chancellor has exclusive original jurisdiction over the subject of divorce. He has jurisdiction to take an account between the parties, as to the produce of their property worked in common in the year 1852. The trustee refusing to act, the *cestui que trust* has the right to come into a court of equity to have the trust carried out; to have the trust fund husbanded and protected; to have a new trustee appointed; and if, by the agreement between the husband and the wife, or her trustee, the parties were to work their slaves and use their live stock, &c., upon their lands in common for the year 1853, and to divide the crop, the husband to be the active manager of the property, and the crop is planted and growing, so that the agreement cannot now be terminated and the hands separated, without irreparable loss, and the husband is injuring the property, and by his dissipation and drunkenness is wholly unfit to carry on the affairs of the plantation and take care of the property, I think the Chancellor has ample power to put an effectual check to his reckless career, by placing the whole of the property in the hands of a fit and proper person to manage it, so as to carry out the agreement between the parties. And here I would take occasion to say, that the fact that a moneyed compensation might be made by Morgan Smith for the injury occasioned to the slaves in their mismanagement, or for dosing them to death with medicines administered by him when intoxicated, as charged in the bill and shown by the affidavits, constitutes no objection to placing the property in the hands of a receiver. Nor is such interposition of the Chancellor, under the circumstances of this case, any in-

fringement either of the letter or spirit of that provision of the fundamental law which declares, that no person shall be deprived of life, liberty, or property, without due process of law. The bill clearly avers the danger to the lives of the slaves employed in the common service of plaintiff and defendant, from the maltreatment of the latter, and charges his utter incapacity, by reason of his dissipated habits, for managing them; and this averment is substantially sustained by the affidavits. Now, the complainant having a common interest with the defendant in the labor and services of the slaves for the time agreed upon, and being the owner of one-half of them, has the right, as we have said, to insist that the agreement shall be carried into effect; that the slaves shall be properly managed and humanely treated; and on failure of the defendant to do this, especially when his dereliction endangers the lives of the slaves, the law pretermits the idea of compensation by way of damages, and on principles of humanity and irreparable injury, arrests the threatened consequences, upon an application *quia timet*.

As to the admission of the affidavits, which were read in aid of the allegations of the bill, it is unnecessary that we say more than that the question thus presented is one which we cannot properly investigate upon this application. If they were improperly read, it would amount, at most, to an error, and cannot, as we have before shown, be revised in this way.

We are all agreed, that upon the case presented, it was clearly within the jurisdiction of the Chancellor, not only to grant the injunction, but to appoint a receiver.

But, although the Chancellor, as we all concede, might himself have properly appointed a receiver, the question arises, whether he exceeded his jurisdiction in the order which he made; and what is the consequence of this excess of jurisdiction, conceding it to be such, as relates to the granting of a prohibition? And upon this question, the court, after much consideration, has been unable to agree.

In defining the powers of the register, the Code (§ 622) declares, that "He has no power to grant injunctions, or to dissolve the same, or to appoint receivers;" and section 2986 declares that "Receivers can only be appointed by the Chancellor," &c.

In the order made in this case, the Chancellor directs that a

receiver be appointed; determines, upon the equities of the bill and the facts brought to view in the affidavits, that the property should be taken from the possession of Smith, and placed under the control of the court; and he directs his register to "*appoint*" a fit and proper person to act as receiver, and to receive and approve his bond, the penalty of which he prescribes, and then proceeds to designate the powers with which such appointee shall be clothed; and the defendant, Morgan Smith, is directed to deliver over to such receiver the property in controversy.

It has been urged in consultation, that the provisions of the Code above referred to are so plain, as not to admit of construction, and hence the appointment by the register as shown by the record, and the attempt to delegate such authority to him in violation of the statute, is, in legal contemplation, a usurpation of jurisdiction, for which a writ of prohibition lies, and not an error of judgment in the construction of the statutes, which, if revisable at all, could only be reviewed on error.

I submit, with all becoming deference, that this argument is a *petitio principii*. It begs as the predicate the major proposition, namely, that the provisions of the Code referred to are not proper subjects of judicial construction. This granted, and the conclusion may well enough stand; but I feel constrained to take issue upon the predicate.

I admit, that the proper practice is, for the Chancellor, after he has determined that the case made is one proper for a receiver to be appointed, to refer it to the register to select and recommend a fit and proper person to fill that office by the Chancellor's appointment, and it would be proper for the register to give notice to the parties, when he would ascertain that fact, so as to afford them an opportunity of being heard; but I do not, by any means, concede that the law is so plain on this point as not to admit of doubt, and to exclude the idea of judicial construction.

I think it may well admit of controversy whether the order of the Chancellor is not in compliance with the spirit and intention of the law makers. He has decided on the equities of the parties with reference to the appointment, has defined the duties, prescribed the powers, given directions as to the security; and the only matter referred to the master is, to appoint, by which is clearly meant the designation of the person to fill the office, and the receipt and approval of his bond.

This selection of the person could doubtless be as well and better made oftentimes by the register than the Chancellor; for he resides in the county from which the receiver would ordinarily come, and may well be supposed to have personal knowledge of the party whom he would designate; whereas the Chancellor may reside a great distance off. But, as determining whether a receiver shall be appointed involves the exercise of high judicial functions, the register may well be deemed incompetent for this duty.

So, in England, the masters have no power to appoint receivers, but the Chancellors only, yet the Chancellors determine upon the equity, and say whether a receiver shall be appointed, and then make the appointment through the master. Mr. Daniel in his Chancery Pleading and Practice, page 1976, says: "The order, when made, usually refers it to the master to appoint a proper person to be the receiver," &c.—See also 1 Smith's Ch. Pr. 631. The master's report needs no confirmation, and is conclusive, unless some substantial objection be made to the Chancellor by petition.—1 Sm. Ch. Pr. 635-6.

True, the letter of the statute is opposed to the order before us; but the crowning virtue of the Chancery Court, and one ground of its original jurisdiction, if I mistake not, was, that it would depart from the letter, in order to attain the spirit and true meaning of the statute; hence the familiar term "the equity of the statute." The statute of frauds and perjuries declares that no action shall be brought to charge any person on any contract for the sale of land, &c., unless the promise or agreement, or some note or memorandum thereof, shall be in writing and signed by the party to be charged, &c. Yet did any one ever suppose that a prohibition lay to the Court of Equity, which, in the face of the letter of the statute, entertained bills for the specific execution of parol contracts, in cases where the refusal of the defendants to perform them operated frauds upon the purchasers?

It matters not, therefore, in my conception, that the letter of the statute is opposed to the order; the question still remains, Is there not room for construction and doubt, as to the true intent and meaning of the statute? There are many reasons in addition to these I have mentioned, such as injury and expense from delay and several trips to distant points in search of the

Chancellor, first, to settle upon whether a receiver is proper, then to appoint him after a fit selection has been made, either by proposals of the party to the register or his selection unaided by them, and then he is not to be inducted into office until his bond is approved. I refer to these inconveniences, merely to show that it is not at all improbable, or at least not so clear as to admit of no ground for doubt, that the legislature or codifiers intended by the term "appoint" to require the Chancellor alone to determine whether a receiver should be appointed, but left him the usual and ordinary means of selecting the appointee by his register, as is the practice elsewhere.—Dard. Ch. Pr. 1976; Att'y Gen. v. Bank Columbia, 1 Paige 511; 1 Sm. Ch. Pr. 631, 635-6.

I come, therefore, to the conclusion that the order of the Chancellor was, at most, but an erroneous construction of the provisions of the Code; that he had the jurisdiction to determine upon the spirit and meaning of its provisions: (State v. Benj. Scott, 1 Bailey's Rep. 294-5;) and that he has done, by an erroneous process, what we all agree he had the right and authority to do in a different mode; that is to say, a receiver has been appointed; and this was right; but he has by the order of the Chancellor been appointed by the register, whereas the Chancellor should have designated the person to fill the office. But having jurisdiction to appoint, and having erred merely in the manner of making it, the authorities, I believe, are all agreed that no writ of prohibition lies to correct errors.—*In re* Bowen, 7 Law & Eq. Rep. (Eng.) 392; 3 Rich. R. 111-114; Buller J. in Hottie v. Ld. Camden, 4 T. Rep. 397; 5 Ark. R. 21; 4 Per. & D. 228.

But there is another ground upon which I think it clear that this court should not interfere. The Chancellor has full power to displace the receiver upon the application of the defendant, if an improper person has been appointed, or to re-appoint and require another bond, if the register's appointment conferred no authority upon the receiver. No application has, however, been made to him, nor has any objection been made to the appointee as an unfit person; but the complaint is, that any one should have been appointed, by reason of a want of jurisdiction on the part of the Chancellor.

The rule at common law is, that no prohibition lay to an in-

ferior court for matters arising out of their jurisdiction, until that matter had been pleaded, and the plea refused.

By analogy to this rule, the defendant should, before applying to this court for aid, have presented the matter to the Chancellor by petition to modify or correct the order which he made in vacation. Until then, he had no right to conclude that the Chancellor would refuse to make the appointment himself, so as to avoid all question as to the power of the register under the order which he had made.

What are we called upon to do? Certainly not to say to the Chancellor that he shall not appoint a receiver. We all agree that he should do this; that he has ample jurisdiction over this matter. But he has exercised his jurisdiction improperly, it is said; then, I answer in the language of Lord Loughborough: "That the court has decided wrong, is ground of appeal, or of review, but not a ground of prohibition." And I venture to assert from a very thorough examination of the authorities, that not a single case can be found, where a court of general jurisdiction has proceeded erroneously in a matter confessedly and beyond doubt within its cognizance, that a prohibition has been awarded.—That, in my judgment, is the precise case before us. It is said in this case, that the Chancellor has enjoined the party from the commission of a trespass, and that this is beyond his jurisdiction, though he has jurisdiction generally over the subject of granting injunctions. Upon parity of reasoning, if the prohibition goes as to the matter of the receiver, it should be awarded as to the injunction; the Chancellor has equal power over both.

I think the conclusion attained by the majority of the court, if carried out in its practical bearings and analogies, will greatly tend to trammel and embarrass the administration of justice in the primary courts. Every error, in one sense, is an excess of jurisdiction, for the court has no authority or right to make a wrong decision; but to hold that the inferior courts should be arraigned before this tribunal, for errors in their interlocutory orders in appointing receivers or granting injunctions or *ne exeats*, and the like, would amount almost to a denial of justice in many cases, for a complainant might be required to come to this court at every stage of his case, to defend the orders supposed to have been erroneously made in it.

Can any case be found where prohibition has gone to the

Chancellor, having general jurisdiction in chancery matters, to control his action in the matter of injunction? Not one, I apprehend. Now, he has equal jurisdiction over the subject of appointing receivers. He has taken the property into his custody, and has the acknowledged right to retain it in the custody of the law; he has reached the proper destination, but has gone there by a wrong road; and the effort now is, to require him to retrace his steps, so as to reach the same place by the right road. Such being the case, and having a discretion, I should certainly upon that ground, if for no other reason, refuse the writ.

I have not cited the authorities, although I have examined them, inasmuch as I think this case is resolved upon the plain principle, that this court will not grant a prohibition to an inferior court for an erroneous judgment, or proceeding, in reference to a matter clearly and confessedly within its jurisdiction. Grant v. Gould, 2 Hen. Bl. 69, clearly shows, as I think, the correctness of my conclusion. I think the prohibition should be refused.

LIGON, J.—1. I hold, that the order made by the Chancellor, directing the register to appoint a receiver to take charge of the estate and property now held in common by the parties, is not only without authority of law, but directly forbidden by our statutes; and, as this is the case, the appointment is absolutely void, and the person so appointed, so far as he intermeddles with the property, with no other authority for so doing than this appointment of the register, is a trespasser.

To prove the first of the above propositions, it is only necessary to place the interlocutory order of the Chancellor and the statutes of the State in juxta-position. That order is in these words: "It is ordered that a receiver be appointed to take possession of the plantation, negroes, horses, mules, stock and provisions mentioned in the bill, and for which a receiver is therein prayed, and also to take charge of every thing on the plantation necessary to carry on the plantation operations, and that said receiver proceed to make and gather the crops, and dispose of the cotton when ready for market; and that he and either of the parties have leave to apply to the court for any other or further directions to him as may be necessary. And, that it be referred to the register of the Court of Chancery at Havneville to appoint a

fit and proper person to be the receiver aforesaid of said property and crops: the person so to be appointed first giving bond in the sum of $25000, to be approved by the register, truly to account for and pay over what moneys he may receive therefrom, and account for and deliver the property so received by him according to the order and directions of the court." Morgan Smith was ordered to deliver the property to such receiver.

Section 2986 of the Code reads as follows: "Receivers can only be appointed by the Chancellor; and when the application is made in vacation, reasonable notice of the time of such application, and the person to whom it will be submitted, must be given, or a good reason shown to the Chancellor for the failure to give the same." The statute defining the powers of registers in chancery provides, "He has no authority to grant injunctions, or to dissolve the same, or to appoint receivers."—Code § 622.

These statutes are highly and positively restrictive in their character, and the legislative will is expressed in terms so plain and unequivocal, that they need no construction, and defy all cavil. The order of the Chancellor, in that portion of it which directs the register to appoint a receiver in this case, uses the same term employed in the statute, and is as little equivocal; but it commands the register to do that, which the statute says he shall not do. The two are directly repugnant to each other, and both cannot stand. In such case the order is a nullity, and can confer neither power nor right on any person whatever.

It can derive no aid from our 51st rule of chancery practice. That rule is in these words: "The rules of the English Court of Chancery, not inconsistent with the statutes of this State and the rules and decisions of this court, so far as consistent with the institutions of this country, are hereby adopted as rules of practice in courts of chancery in this State."—Clay's Dig. 418, rule 51.

Now, suppose the English practice to be, as it is said to be in the argument, that the Chancellor has the power to appoint receivers, but may, and does by his order, delegate it to the master in chancery, and the latter really makes the appointment. Still, I answer, this rule has not been adopted here, because it allows some other officer than the Chancellor to appoint a receiver, and is therefore inconsistent with our statute, which says in

unequivocal terms, "receivers can only be appointed by the Chancellor," and being so, is expressly excluded from our rules of chancery practice by the terms of our 51st rule.

It is also inconsistent with section 622 of our statutes, which expressly prohibits the register (who is also master in chancery in our system,) from appointing receivers.

Thus, the argument in support of the order of the Chancellor in this case, drawn from the English chancery, in connection with the 51st rule of our practice, falls to the ground.

But it is said, that the spirit, if not the letter of our statute, would probably justify the order of the Chancellor in this case, and the act of the register in appointing the receiver. I confess, that in relation to the sections 2987 and 622 of our Code, I am unable to appreciate this position. When the language of a statute is plain, clear, direct and intelligible, and wholly incapable of misconstruction, as is the case with the sections referred to above, there is no room for construction; and I do not feel authorized to throw aside the language, and go upon the hunt after a spirit of the words, which, when found, will contradict their clear import, and nullify their legitimate meaning.

It is also said, that the order of the Chancellor in relation to the appointment of a receiver may be regarded as a substantial appointment of that officer. Let us see whether the Chancellor so understood himself. The language of the first part of the order is, "that a receiver be appointed to take charge of" &c. If it had then proceeded to name a person to fill that office, all would have been well, and the words quoted would have amounted to a present command, and would have been an appointment of such person to the office. But this is not the case. No person is named for the office, and it would scarcely be contended that under this general language any person could assume to act as receiver. This part of the Chancellor's order can only import his judgment that the case presented by the bill and *ex parte* affidavits, was one in which it was proper to appoint a receiver. This is clear from the after part of the order, in which he directs, "that it be referred to the register of the Court of Chancery at Hayneville to appoint a fit and proper person to be the receiver aforesaid of said property and crops: the person so to be appointed first giving bond &c." Had the Chancellor thought that the receiver had been appointed

by himself, why does he mention another, whose duty he makes it "to appoint" him, and speak of the appointment and the person "so to be appointed" as things yet future, and acts yet to be done?

The language of the order cannot, in my opinion, bear the interpretation contended for, on any legitimate construction which can be given to it. Nor can I suppose, that the Chancellor used the word "appoint" in one sense, in one part of the order, and in a different sense in another. That word in the statutes and in the order being used in the same connection, must be understood in the same sense.

It is clear that the register understood the order, as I think the Chancellor understood it himself, for he forthwith proceeds to appoint Frank J. Smith, take his bond, and install him in office as receiver.

It is, however, unimportant how the terms of the order were understood by the Chancellor: it is sufficient that it gives to the register power to appoint a receiver, and to this extent it is void, because the statute prohibits the register from the exercise of such a power, and confines it exclusively to the Chancellor.

This is not a mere error in a case clearly within the jurisdiction of the Chancellor, but the exercise of a power clearly beyond his jurisdiction; and in such case the act done is, to my mind, as clearly void as are the acts and judgments of inferior courts of limited jurisdiction, when their records fail to show every fact necessary to cause their jurisdiction to attach.

2. I admit, that it is discretionary with this court to grant or refuse the writ of prohibition, and that it should never go unless the party applying for it has no other remedy to which he can resort for his protection; and then, only in cases in which the inferior courts have clearly exceeded their jurisdiction in the order complained of.

But I do not confine its issue to courts of limited jurisdiction, strictly speaking. Nor do I derive the power of this court to issue writs from the common law. It is conferred on us by the constitution of this State, and to this, and this alone, I resort to ascertain the courts subject to be restrained or prohibited by the Supreme Court. In this view, it is wholly unimportant whether the English Court of King's Bench, or any other re-

visory court of that kingdom, over issued a prohibition to an inferior court of general jurisdiction or not; if our constitution confers that power on us, we may exercise it, although the Court of King's Bench could not do so in England. To the English books and cases I am willing to go, in order to consult them for proper cases in which to use my discretion in granting the writ; but not to learn our power to award it, or the courts to which it may be sent.

It may not be out of the way here, to remark, that, in the numerous cases which we have examined from the English books, we have been unable to find one in which a prohibition has been granted to a court of general jurisdiction. The courts which have been prohibited in that country are those of a limited or particular jurisdiction, and those only. It would seem from this, that such courts are not subject to prohibition in England, and if, in our search for authority to prohibit courts of general jurisdiction, (if any inferior court can rightly be so styled,) we confine ourselves alone to English books, and the practice of the higher English courts, there will be found no warrant for it whatever.

But the constitution of Alabama declares, "that the Supreme Court shall have power to issue writs of injunction, *mandamus*, *quo warranto*, *habeas corpus*, and such other remedial and original writs as may be necessary to give it a general superintendence and control of inferior jurisdictions."—Con. of Ala. Art. 5 § 2.

Here both the power to issue writs of the class of the one here prayed for, and the courts to which they may go, are to be found. These courts are described as "inferior jurisdictions." The term inferior is a relative and comparative one. In respect to the Circuit Court, the Courts of Probate and justices of the peace may be said to be inferior jurisdictions, because the decisions and acts of the latter are subject to be reviewed by the former. So, also, is the Probate Court inferior to the Chancery Court for the same reason. In respect to the Supreme Court, all others are inferior, for this has "appellate jurisdiction, co-extensive with the State," and "a general superintendence and control of inferior jurisdictions."—Nugent v. The State, 18 A. R. 521.

It is immaterial, under this view of the powers of this court,

whether the inferior court, whose action we are called on to control, be a court of general or limited jurisdiction. How much this consideration should weigh with us in exercising that power, is a different question altogether.

I think it clear, that where an inferior court makes an order, which it has no authority to make, while the case is in progress, and this order is immediately injurious to the rights of the suitor, and tends to oppress him, it is the plain and imperative duty of this court to interfere when called upon, and arrest the execution of the illegal and oppressive order. But, if such unauthorized act is done at such a stage of the proceedings as will authorize the party complaining of it to prosecute an appeal or writ of error, an extraordinary remedial writ should never be granted.

The order in this case was made at the beginning of the suit, and, unless the defendant is relieved from its operation, must continue to deprive him of the control and use of his property for the remainder of the present year; and it divests him of the power to receive or enjoy the proceeds of his crop when grown and sent to market. It, in fact, shuts him out of the use of the provisions laid in to supply food for the present year.—Our rules of practice allow him no appeal or writ of error, and, without the intervention of this court, he must suffer the wrong done him by the void order, during the period of a highly litigated chancery suit.

It is no sufficient answer to this to say that, as the case is a proper one for the appointment of a receiver, (and I concede this in the present aspect of this record,) the Chancellor may proceed and appoint one himself. Be it so. Such a receiver would come in according to law, and be no trespasser, as the present one is; and thus the rights of the suitor will be protected, and the laws of the land vindicated.

But it seems to be doubted, whether the orders and judgments of inferior courts of general jurisdiction, when made under a mistake of their jurisdiction, or in cases in which they exceed their jurisdiction, stand on the same footing with similar orders made by inferior courts of limited jurisdiction, with respect to this writ. It is supposed that the former are regarded as mere errors, while the latter are void.

I have been unable to find any such distinction taken in the books, and I can see no good reason why it should exist. An

order made, or judgment rendered, by a court which had no jurisdiction of the matter to which it relates, is universally styled "a nullity," or "merely void," irrespective of the fact that the court is one of limited or general jurisdiction.

Thus, if the Circuit Courts render a judgment, or the Chancery Courts a decree, against a suitor who has died pending the litigation, and before the rendition of such judgment or decree, such judgment or decree is a nullity, although these courts have full jurisdiction of the subject matter of the controversy.—11 N. H. 191.

So, a judgment not founded on the service of mesne process, nor rendered on confession or the voluntary appearance of the party, is a nullity, and gives the party who obtains it no right as against the defendant, notwithstanding the court had jurisdiction to render such judgment between the parties, had they been rightly before it.—Enos v. Smith, 7 Sm. & Mar. 85; McComb v. Ellett, 8 Sm. & Mar. 505; 2 McLean 51.

Although a court be one of general jurisdiction, in the common acceptation of that term, still, if it fail to observe the rules necessary to enable it to act as between the parties to a particular suit, and cause its jurisdiction to attach to that case, by giving notice to the defendant, its action will be *coram non judice* and void. If the rights of suitors are about to be injuriously affected by the execution of such void judgment, there is no satisfactory reason existing, within my knowledge, why the oppression and wrong threatened may not as well be prohibited, when the law allows no appeal or writ of error, as if the void order or judgment had been made or rendered by a court of limited jurisdiction, as that term is ordinarily understood.

When a court of inferior jurisdiction fails or refuses to proceed in a cause, rightly and properly before it, the party injured applies to this court; and when he has made out his case, we award a *mandamus* to the court below, by which it is commanded to proceed with the cause. I can see no reason why we should not as willingly hear, and as speedily redress, the wrongs of a suitor who is about to be, or has been injured by the illegel and unwarrantable acts of those courts, in matters wherein they exceed their jurisdiction. And this is the office of a writ of prohibition.

But neither should be granted when the wrong done could be redressed by appeal or writ of error. Neither of these remedies

is, however, allowed in the present case, and it is my clear conviction, that the party applying is entitled to a writ of prohibition.

It is said, however, that, before this court should act in the premises, the matter complained of should be brought before the Chancellor, that he may have an opportunity of correcting the error, and that where complaint is made of an unwarrantable exercise of power by an inferior court, the objection should be taken in that court before it is allowed to be heard here. It is also said, that a prohibition will not go after the inferior court has acted.

The case of the State v. Scott, 1 Bailey 294, is cited to sustain this view. I do not so understand that case. It expressly holds that the party complaining of the exercise of unwarrantable power by the inferior court, is not bound to plead the want of jurisdiction in that court, if such want of jurisdiction appears by the face of the proceedings; and upon the authority of Bacon it is there said, "the superior court will interfere, even after sentence, and restrain the inferior court by prohibition." Bacon's Ab., title Prohibition.

The majority of the court concurring in the propriety of issuing the writ of prohibition, it is ordered that a writ of prohibition issue to the Hon. Joseph W. Lesesne, Chancellor of the southern division of the State of Alabama, commanding and enjoining him, without delay, to revoke and annul, or to cause to be revoked and annulled, the order made in the case of Sarah O. Smith, by her next friend, &c. v. Morgan Smith, now pending before him in the Chancery Court held for the County of Lowndes, in said State, by which the register in chancery at Hayneville, in said County of Lowndes, is directed and ordered to appoint a fit and proper person to be receiver of the estate and property mentioned in the proceedings in said cause, and under which Frank J. Smith has been appointed such receiver; and, wholly to absolve and release the said Morgan Smith from the effect and operation of said order to said register, under which the said F. J. Smith was appointed receiver as aforesaid.

GOLDTHWAITE, J.—In relation to the power of this court to grant a prohibition to the Court of Chancery in a proper case, I entertain no doubt.

Upon the matter of the bill, I am satisfied that the Chancellor had jurisdiction, and that upon the case, as made by it, he had authority to appoint a receiver. I do not say it was a correc exercise of that authority, for I do not consider that question as presented upon the present application, and for that reason I have formed no opinion in relation to it. Having, however, jurisdiction so far as that matter was concerned, it was, unquestionably, the duty of the Chancellor to proceed upon his own convictions as to whether the case before him required the property to be committed to the custody and management of a receiver; and if he has erred as to this question, it was simply an error, which could be reversed on appeal, but which would constitute no ground for a prohibition.

In relation to the order made by the Chancellor, directing the register to appoint a receiver, I have more difficulty. It has been urged that the Code, in direct terms, prohibits the register from appointing receivers, and confines this power to the Chancellor alone; and this, I think, is the correct construction of the law. The words of the sections of the Code referred to (§ § 622, 2986) are clear, and must be taken in their ordinary sense. The appointment of a receiver is not a mere ministerial act, but one requiring the exercise of judgment and discretion. It implies the selection of a fit and proper person to manage the property, and, although the Chancellor might very properly call upon the register to aid him in making the appointment, I do not think he could delegate the power of appointment to him; and in so doing, I am clear that the Chancellor committed an error. But is it such a one as will warrant a prohibition? The general ground on which this writ is granted, is, where the inferior court has either acted without jurisdiction, or where it has assumed to proceed in a case of which it has no cognizance, or where it has exceeded its jurisdiction, by doing some act in the progress of a case which, under the law, it has no authority to do.—3 Black. Com. The cases cited by the learned commentator to sustain the last position, as to the question of excess of jurisdiction, all refer to courts of special jurisdiction; and I am inclined to the opinion that the courts of Westminster do make this distinction, but it does not apply with us, for the reason, that the constitution has conferred upon this court the power to control inferior jurisdictions (Art. 5, §2);

and the Court of Chancery is an inferior jurisdiction within the meaning of that instrument. If that court transcends its powers, and exceeds its authority, I am unable to perceive any valid reason why its action should not be controlled as well as special jurisdictions. The same reasons which would require the exercise of a controlling power in relation to other courts, apply equally to it, and the constitution has, in express terms, provided for its exercise by this court; so that I cannot think that the distinctions, if any exist at the common law, between courts of general and special jurisdiction, in relation to the grant of prohibitions, exist with us.

Upon authority, I regard it as clear that, when a court of limited or special jurisdiction exceeds its authority, although upon the misconstruction of a statute, which it is called upon, in the discharge of its legitimate duties, to construe, it furnishes ground for a prohibition. This is shown by the language of Blackstone, who, in speaking of this writ, says, that it lies when "in the handling of matters clearly within their cognizance, they (the courts) transgress the bounds prescribed to them by the laws of England, as where they require two witnesses to prove the payment of a legacy, a release of tithes, or the like."—3 Black. Com. 112; and is laid down more clearly in the case of Grant v. Gould, 2 H. Black. 69, where the whole doctrine applicable to prohibitions was elaborately and ably discussed.—In that case, Lord Loughborough says: "Another ground of prohibition is, where an act has passed with respect to any authority resident in other courts, as in the ecclesiastical courts in which there is an inherent jurisdiction. In such a case, the courts of Westminster Hall have conceived that where the authority is limited by an act of Parliament, the court which acted differently from the act, was, in that instance, exceeding its jurisdiction, and therefore liable to a prohibition." Applying these principles to the case before us, it is clear that, if the construction I have given to the provisions of the Code is correct, the Chancellor, in directing the register to appoint a receiver, has, in the words of Lord Loughborough, "acted differently from the act," and in doing so has exceeded his powers. It was an act which, under the statute, he had no authority to do; and granting, for argument's sake, that the provisions of the Code regulating the appointment of the receiver were

such as afford some ground to warrant the construction given them by the action of the Chancellor, in delegating the appointment to the register, I regard that circumstance as entitled to no consideration whatever. It is conceded that the Chancellor believed that he was authorized by law to make the order, and such, we suppose, is the case in every instance in which courts exceed their jurisdiction. They err in relation to the law, and the superintending court exercises its authority, not merely because they have mistaken the law, or misconstrued the statute, but because, acting upon that error, they have gone beyond their legitimate powers. It can make no difference to the party complaining whether the act arises from a misconstruction or a wanton violation of the law. It has been supposed that the decision of the Queen's Bench in the matter of Bowen is adverse to the application of the relator; but that case is clearly distinguishable from the one under consideration. There the question arose upon the statute of 5th and 6th Vict. c. 116, which gave to the County Court the power to grant protection from process in the case of a trader, where he owes debts amounting in the whole to less than £300. It appeared that the insolvent had obtained protection under a prior order, and the debts at the time of his subsequent petition amounted, with the debts at the time of the former order, to more than £300, all of which were unpaid. The County Court granted the protection, and the prohibition was applied for, on the ground that the judge of the County Court had no jurisdiction to grant the protection, as the debts then owing by the petitioner exceeded £300. The judgment of the court was against the prohibition, on the ground that the County Court judge had the right to determine whether the debts owing by the trader were above or below £300; and to do this, he might decide whether what remained due under the former insolvency was to be taken into account in making up that sum. The decision, in my opinion, was clearly correct, as the question determined was clearly within the jurisdiction of the inferior court, and the decision rests upon that ground. But this is not the case here. The Chancellor had the right to appoint a receiver, and must determine, upon the facts before him, whether it is a proper case. If he determines wrong, it is an error within his jurisdiction, and so far is analogous to the case just referred to, and a prohibition will not lie. But the

Chancellor had no authority to delegate this power of appointment, which was a discretion reposed in himself solely, to another; in doing this, he went beyond his jurisdiction, and an error of this description is ground for a prohibition.

The fact that the Chancellor could appoint the same person receiver, on an application to him, does not, in my opinion, affect the question, except as it may influence the court in the exercise of its discretion in granting the writ. If it was certain that the application would be renewed, and the same person appointed, as I entertain great doubt as to the authority of the person in possession under the present appointment, to discharge the duties which devolve upon him in the capacity of receiver, I should be in favor of granting the writ, in order that he, or some one else, might be invested with the authority necessary to protect himself and the property, as well as to avoid any collision between himself and the other parties.

PHELAN, J.—Can prohibition go only as to courts of limited or special jurisdiction, and where such courts act without jurisdiction; or, will it also lie as to courts of general jurisdiction, and where such latter courts exceed their jurisdiction?

Whatever may be the rule of the English courts, or of such of our American courts as follow their rule, I am of opinion that, under the constitution of Alabama, the Supreme Court may, in a proper case, issue a writ of prohibition even to a court having general jurisdiction. The constitutional grant of power, and the duty which attaches to that grant, embrace, as I conceive, all subordinate tribunals.

To state my conclusions in this case in few words, I may say that I am convinced that this court may issue a prohibition to any subordinate tribunal whatever in this State, and that this writ will properly lie where the subordinate tribunal acts without jurisdiction, or, what is the same thing, exceeds its proper jurisdiction, and there is no other adequate remedy for the injury that may result from the illegal action of such court.

Furthermore, I am clear, in this case, that the Chancellor exceeded his jurisdiction in directing the register to appoint a receiver. That was a judicial act, which he "only" by express law was competent to do. The designation of the individual is, as I conceive, an indispensable part of the duty confided by

statute to the Chancellor alone. He is required, not only to decide that the case is a proper one for a receiver, but he is bound to exercise judicial functions in the selection of the individual upon whom this office or trust is to be conferred. I was, at one time, inclined to the opinion that the provisions of the Code to this effect were too plain to admit of construction, but this on further reflection I surrender; but I do this more in deference to the division which exists here, and the action of the Chancellor, than to the convictions of my own reason on the letter of the statute simply.

The appointment, then, in this case was, as I conceive, not only without law, but contrary to express law in a matter of jurisdiction, and so void.

Is there any adequate remedy for this wrong, as respects the respondent Morgan Smith? None, that I can see. The case, as made by the record, would, I agree, well justify the appointment of a receiver; but then he must be appointed according to law, or this court is bound, I think, to interpose, when a proper application is made, by prohibition, to arrest or prevent a wrong which may otherwise run through the whole subsequent proceedings, producing great confusion and probable damage to Smith, or to some person on the opposite side who may participate in the transactions by reason of this order, and because I see no other way to prevent such wrong and its probable consequences.

That persons injured may have their remedy by suit after the injury is consummated, is not, to my mind, a sufficient answer to an application for preventive justice, where the action complained of is that of a judicial officer or tribunal, and respects an act professedly judicial, and the proceeding is in *fieri*.

For these reasons, I concur in allowing the writ of prohibition.

GIBBONS, J.—I concur in the views expressed in the foregoing opinion of the Chief Justice.

ZEIGLER & HALL *vs.* DAVID.

1 A party against whom an injunction or process of seizure has been obtained in a chancery suit, and who has been injured in consequence thereof, may, after the dismissal of the bill for want of prosecution, bring his action at law, without permission from the Chancery Court, to recover on the bond of indemnity required by the *fiat* as a pre-requisite to obtaining the process.

2. In such case, an averment that the bill was dismissed, without stating the grounds of dismissal, is sufficient.

3. And it is unnecessary to aver notice of the dismissal to the obligors in the bond, as they are parties to the record, and presumed to be cognizant of the disposition finally made of the cause.

4 When plaintiff's slaves are taken under a writ of seizure, issued out of chancery on a bill for divorce filed against him by his wife, and, the bill being dismissed for want of prosecution, plaintiff brings suit on the indemnity bond to recover damages, the record of a second suit commenced by the wife for the same purposes as the first, and still pending, is relevant and admissible evidence for the defendants in the suit on the bond, if it is shown that the slaves seized in the first suit, after the institution of the second, were in the custody of the law, or of one of the suitors in the Chancery Court by its order; but when the bill of exceptions does not set out the record of the second suit, and only recites that, on the filing of the second bill, an order was granted, commanding the register to issue a writ according to the prayer of the bill, on complainant's entering into bond "conditioned to have said slaves forthcoming to abide the final order and decree of the court," and that the bond was taken, pursuant to the order, conditioned to pay plaintiff "all such costs and damages as he might sustain by the wrongful suing out of the injunction and process," the Appellate Court cannot infer that a writ of seizure was issued in the second suit, and the record is therefore irrelevant and inadmissible.

5 It is not error to allow plaintiff to amend his declaration, even after the trial has been commenced, by the alteration of a date alleged under a *videlicet*.

6. If the husband turn his wife out of doors, or by his misconduct compel her to leave him, he is responsible for necessaries furnished her by another; but the labor and services of slaves applied to the support and maintenance of the wife, cannot be regarded as necessaries, though their value was not more than sufficient for her necessary support and maintenance, nor can the husband be charged with their value in a court of law.

7. In debt on bond conditioned to indemnify the obligee for all costs and damages he might wrongfully sustain by the suing out of a writ of seizure from the Chancery Court, the death of one of the slaves seized under the writ before the time of trial, does not affect the defendant's liability for hire.

8. In such case, plaintiff may recover the damage actually sustained, without proof of malice in suing out the process.

9. The transcript of the record of the chancery suit showing the dismissal of the bill for want of prosecution, is *prima facie* evidence that the writ of seizure was wrongfully obtained.

10. And if the possession of the slaves is not restored to the plaintiff, he is entitled to recover their hire down to the time of trial, although, after the dismissal of the first bill for want of prosecution, a second was filed for the same purposes, and a new bond given, conditioned for the forthcoming of the slaves to abide the final order and decree of the court.

ERROR to the Circuit Court of Autauga.

Tried before the Hon. GEO. D. SHORTRIDGE.

The facts will sufficiently appear from the opinion of the court.

N. HARRIS, for plaintiffs in error:

1. The declaration should show that there was an order of the court in which the chancery suit was pending, dismissing the bill, and that the defendant have leave to bring suit on the injunction bond, and an order that defendant have leave to withdraw the bond for the purpose of bringing suit on it.

2. The declaration should show that plaintiffs in error had notice of the dismissal of the bill, and that the bill was dismissed on a hearing on the merits.

3. The plaintiff in the court below was not entitled to recover of the defendants any damages for the detention of the slaves after the filing of the second bill for divorce, and the taking of the second bond; and there was, therefore, error in rejecting the record of the second bond, which was offered in evidence by the defendants below.—Winston & Fenwick v. Rives, 4 Stew. & P. 281; Brooks & Brown v. Shepherd, 4 Bibb 572.

4. The court erred, in permitting the plaintiff below to amend his declaration.

5. The court should have admitted the evidence offered by the defendants below, showing that the plaintiff had by his conduct driven his wife to separate from him, that the labor and services of the slaves had been applied to her support, and that their labor and services were not more than sufficient to maintain her. If the husband turn his wife out of doors without sufficient cause, or she leave him on account of ill treatment, he will be liable for necessaries furnished to her.—Story on Contracts

114, § 107; Chitty on Contracts 173; Clancy on Husband and Wife 28,29; 11 E. C. L. R. 64. In all actions arising from contracts, a party can only recover to the extent of the actual damage sustained.—2 Green. Ev. 208; Sedgwick on Damages (2 ed.) 430, 431, 441, 442, 446; Hatchett v. Gibson, 13 Ala 594; 9 East 72; 2 Burr. 1210; 2 Denio 616.

6. The record of the suit showing the dismissal of the bill, does not show that the injunction was sued out wrongfully.—3 Phillips on Evidence (C. & H.'s Notes) 916.

7. The plaintiff below was not entitled to recover damages, for the detention of the slaves, beyond the dismissal of the bill, or at least, beyond the time of filing the second bill, and giving the second bond.

Elmore & Yancey, and S. F. Rice, *contra*:

1. The count demurred to contains every material allegation.—I Iredell 139.

2. The transcript offered in evidence by plaintiffs below, was properly admitted, because: 1. The court had power to permit the amendment to be made during the trial.—Bannister v. Wetherford, 7 B. Mon. 271; 2. There was really no variance between the declaration and the transcript as it stood before the amendment, the actual date of the dismissal, as long as it was alleged to be before suit brought, being immaterial, or a collateral issue; and being alleged without vouching the record, and not as descriptive of it.—3 Stark. Ev. 1599, 1603; Henry v. Tilson, 17 Vermont R. 479, 484; Martin v. Miller, 3 Missouri 135.

3. The transcript offered in evidence by plaintiff in error, was properly rejected: 1. Because it in no way appeared that any writ of seizure ever issued, or that the negroes involved were ever seized by virtue of the proceedings set forth in the transcript, and the proof was, that the defendant below had never redelivered the negroes: all intendments will be in favor of the judgment. 2. It was properly rejected, because the plaintiff in error was a wrong-doer, and, until he restored the possession which he wrongfully obtained by abuse of the law's process, he cannot be allowed to set up that he has since sued out another process, under which he retains the negroes, and thus limit the damages.—5 Barn. & Ald. 835; Moore v. Wallis *et al.*, 18 Ala. 463; Leavitt v. Smith, 7 *ib.* 182. 3. Because Zeigler,

having obtained possession of the slaves under and by means of the bond sued on, until he restores possession to David, is not in a situation to set up, in mitigation of damages, that by his act another process has been sued out, restraining David from taking possession of them.—Braley v. Peck & Clark, 22 Ala. 361; Upham v. McBride, 10 B. Mon. 202; Hodges v. Gewin, 6 Ala. 478]; McLane v. Spence, 11 *ib.* 172. 4. Because, though it should be conceded a writ of seizure issued, yet, as the bill and indemnity bond were only offered for a special purpose, viz., "to show that a second injunction, similar to the first, had been given," and the bill and indemnity bond contained no evidence of the issuance of such injunction bond, they were properly rejected as irrelevant. 5. Because, as the transcript was offered only for a particular purpose, it was an admission that all else in it was irrelevant and incompetent.—9 Ala. 959; and therefore an admission that there was nothing in it to show a seizure of the slaves. 6. Because a record is not evidence of any fact which can only be inferred by the court; and in this case, the seizure would have to be inferred.—McCrary v. Remson, 19 Ala. 430. 7. Because the measure of damages was, the value of the property at the time David was dispossessed, increased by the damages which he was proved to have suffered by the loss of possession.—11 U. S. Digest 126 § 9; and the transcript was offered to prove that David could not recover damages beyond the date of the new bond. 8. Because it was offered as a whole, and contained irrelevant testimony, viz., the bill of divorce; and when such is the case, the court may reject it as a whole.—Smith v. Zaner, 4 Ala. 99; Melton v. Troutman, 15 *ib.* 535. 9. Because the pendency of another proceeding in chancery in relation to the same slaves, cannot be pleaded in bar, nor set up in mitigation of damages.—McLane v. Spence, 11 Ala. 172; McCrary v. Remson, 19 *ib.* 430. 10. Because Zeigler, being a surety on the indemnity bond sued on, is not discharged from liability on it by the fact that he and Milly David have obtained an injunction out of chancery since the execution of the bond.—Hodges v. Gewin, 6 Ala. 478; Leavitt v. Smith, 7 *ib.* 182.

4. The separation of David from his wife, and its causes, and the facts that defendants gave up the slaves to Mrs. David, and that their labor was not more than enough for her necessary support, were entirely inadmissible as evidence in this action, for

various reasons. If urged as a set-off, they were unliquidated damages, and such cannot be the subject of set-off.—Dunn v. White & McCurdy, 1 Ala. 645; McCord v. Williams & Lowe, 2 *ib.* 71. Nor can a set-off be pleaded in an action like this, for unliquidated damages.—Brown v. Chambers, 12 *ib.* 698. Neither can they be admissible under the doctrine of recoupment, because they do not spring out of the same contract or transaction, and constitute no cause of action in Zeigler.—Batteman v. Pierce, 3 Hill 171. The defendants below, being in the position of a trespasser or wrong-doer, cannot be allowed to answer the plaintiff's demand, by setting up their application of the proceeds of the property even to the benefit of the owner.—5 Barn. & Ald. 835; Sedgwick on Damages, *supra.* The cases cited from 2 Burr., 9 East and Sedgwick on Damages, proceed on the ground that the plaintiff had been paid his damages; but this in no way establishes that, because Zeigler hired the negroes to Mrs. David, plaintiff's damages have been paid. One can only have a right of action for necessaries furnished a wife separated from her husband, when he has furnished his own property to the wife. This cannot, then, enable Zeigler to plead that he loaned the negroes to Mrs. David, because they were not his property, but plaintiff's. In the cause of one who is dismissed from employment before the expiration of his term, and finds other employment, the law allows this to be shown in a suit on the contract, because plaintiff there was paid: such is not the case here.

5. The charge given by the court was correct. David's injury was continuous; and he had a right to recover up to the time of trial, if the injury continued until then. He complained of the wrongful seizure and detention of his slaves: they were detained up to the trial.—Puckett v. Smith, 5 Strobh. Law R. 26.

6. The first charge asked was properly refused, because the condition of the bond sued on was, to pay all damages which plaintiff might "wrongfully sustain."—Wilson v. Outlaw, Minor's Rep. 367; Garrett & Hill v. Logan, 19 Ala. 344. As the charge contained illegal as well as legal matter, the court could properly refuse it.

7. The second charge asked was properly refused, because the dismissal of the bill for want of prosecution, was a breach of

the bond, and evidence that the process was wrongfully sued out.—White v. Clay, 7 Leigh's R. 68; Garrett & Hill v. Logan, 19 Ala. 344; Badlam v. Tucker, 1 Pick. R. 236; 4 Hawks' R. 38; Secor v. Babcock, 2 Johns. R. 203.

8. The third charge asked was properly refused, because the bond for the forthcoming of the slaves was but an additional security, and David could select on which he would proceed.—Spivey v. Morris, 18 Ala. ; Caperton v. Martin, 5 *ib.* 220.

9. The last charge asked was properly refused, because Zeigler had not delivered up the slaves on Sept. 30, 1850; and the forthcoming bond was but an additional security.—Spivey v. Morris, *supra;* and for the further reason, that David could not sue on the injunction bond until Sept. 30, when the bill was dismissed.—Smith & Tatum v. Morris.

10. All the charges were properly refused; because they ask instructions relative to an "injunction;" whereas, the process in relation to which plaintiff sought a recovery, was not an "injunction," but a "writ of seizure," or in nature of an attachment: the charges were, therefore, irrelevant and abstract.—Ross v. Ross, 20 Ala. 106; Long v. Rodgers, 19 *ib.* 322; Murray v. The State, 18 *ib.* 727; Bradford v. Marberry, 12 *ib.* 529; Ward v. Winston, 20 *ib.* 167. The charges asked were all calculated to mislead the jury, and were for that reason properly refused.—Moore v. The State, 18 Ala. 532; Felix v. The State, 18 *ib.* 720.

CHILTON, C. J.—This was an action of debt brought by Henry P. David against the plaintiffs in error, Edward J. Zeigler and W. T. Hall, to recover upon a bond in the penalty of five thousand dollars, executed by them and William R. Pickett, on the 14th day of January, 1848, payable to said David, and containing a condition "to indemnify said David for all costs and damages he may wrongfully sustain by the suing out certain process issuing from the register of the Chancery Court in Wetumpka, by the order of a circuit judge, acting as chancellor *pro hac vice;* by which order certain negro slaves were required to be seized and disposed of by the sheriff, as therein directed."

The *fiat* upon which the process issued, was made upon the exhibition of a bill by Mrs. Milly David, by said Zeigler and Thomas H. Hall, her next friends, charging, among other

things, that she is the wife of said Henry P. David, and that, at the time of their marriage, she was possessed of and owned considerable property, consisting of lands, negro slaves, and live stock, a list of all which is given in the bill, and which, with certain moneys loaned her husband since their marriage, went into his possession and were then retained by him, except a small part which he had sold to pay her debts to the heirs of Nicholas Zeigler, her former husband; that he had driven her from his home by repeated acts of cruelty, and threatened to run the property beyond the jurisdiction of the court. The bill prays for a divorce *a mensa et thoro*, or from the bonds of matrimony, and for an order of seizure of certain slaves; also for a suitable provision to be made for the complainant's support, and for an allowance to enable her to prosecute her suit.

The bill was answered by the defendant, and after remaining in court until October, 1850, was dismissed by the Chancellor for want of prosecution.

1. The defendant, in the court below, filed a demurrer to the declaration, which the court overruled, and which is, among other matters, here assigned for error. The first ground of objection to the sufficiency of the declaration, is, that there is no averment of any order of the Chancery Court permitting the plaintiff below to sue upon the bond. No authority has been cited in support of this position; and, upon principle, we see no reason why a party against whom an injunction or process of seizure has been obtained, and who has been injured in consequence thereof, may not, after the suit in chancery has been abandoned by the complainant and dismissed for want of prosecution, institute his action at law to recover upon the bond, required to be given by the *fiat* as a pre-requisite to obtaining such process, without any permission from the Chancery Court. True, the bond on which the action is founded constitutes a part of the record of that court; but our practice does not require profert to be made of it, and it is sufficient that the complainant produces it when demanded for the purposes of the trial.

2. The next objection is, that the declaration fails to aver that the bill was dismissed upon the merits, or that the defendants in the court below had notice of such dismissal. We think it altogether sufficient to aver that the bill was dismissed generally, without stating the ground of the dismissal. It amounts

to a final disposition of the cause, adverse to the complainant, and entitled the defendant in the chancery suit to recover upon the bond such damages as he had wrongfully sustained by its exhibition and obtaining the process prayed for.

3. As to the want of the averment of notice of the dismissal: It is only necessary to remark, that the dismissal of the bill was a matter peculiarly within the knowledge of the party whose duty it was to prosecute it, if founded on a meritorious ground of complaint; and hence, as one of the plaintiffs in error was the next friend of Mrs. David, by whom the bill was filed, and both were parties to the record, being on the bond, they must be presumed to be cognizant of the disposition which was finally made of the cause. At all events, this matter does not more properly lie within the knowledge of the plaintiff below, than of the defendants, and in such cases it is well settled that no notice need be averred.—1 Chitty on Pl. 338, and cases cited in notes.

4. As to the exclusion of the exemplification of the record of the second bill filed by Mrs. David, and the bond given upon the exhibition thereof: We regret that the bill of exceptions does not set out this rejected proof, in order that we might determine upon its legal effect, and ascertain whether or not it was relevant. It is very certain that it was competent evidence, if the record showed that, by proceedings under the *fiat*, the slaves seized in the first suit, after the institution of the second, were in the custody of the law, or, which is the same thing, in the possession of one of the suitors in the Chancery Court, by its order. It is competent for that court to provide for the safe custody of effects seized by its process, and it will, in justice to its suitors, pending the litigation, so provide as to render the effects so tied up as productive as may be consistent with their safe-keeping or security.

It appears that the slaves seized under the process obtained upon the exhibition of the first bill, were in Mrs. David's possession when the second bill was filed. It is said in the bill of exceptions, that the second bill contained substantially the same allegations as were set forth in the first, and that the *fiat* granted upon it directed the register that, if the next friend of the complainant should enter into bond in double the aggregate value of the slaves, whose names are set out, "conditioned to have said

slaves forthcoming to abide the final order and decree of the court," then that a writ issue according to the prayer of the bill. Neither the second bill nor the bond is set out; but, looking to the prayer of the first bill, we find that the complainant prays for an allowance as maintenance during the pendency of the suit, and also that the sum of five hundred dollars be paid her for the purpose of enabling her to prosecute her said suit against her husband, or such other sum as the Chancellor shall deem proper, "unless it should please the court to order and direct that complainant, by herself or her next friend, may give bond with security for the forthcoming of the said negroes, (the same mentioned in the bill of exceptions as seized under the process,) which complainant took away with her and has now in possession, to abide the decision of the court in the premises; in which event, complainant would not pray for any allowance for maintenance, or for the prosecution of the suit, *pendente lite*," &c. The *fiat* upon the second bill would seem to be predicated upon this prayer, and to contemplate that the complainant should be allowed to retain the possession of the slaves; otherwise, it would not have required that her next friend should bind himself to have them forthcoming to abide the final order of the court. It is said that the second bond was taken "in pursuance of this *fiat*, payable as and in the amount specified in said order," &c. But, when speaking of it, the bill of exceptions states, that it was "conditioned to pay the said Henry P. David all such costs and damages as he might sustain by the wrongful suing out of the injunction and process," and that it was similar to the bond set out in the transcript offered in evidence by the plaintiff in the court below, which is the transcript of the proceedings had in the first suit. It is not stated that any process of injunction or order of seizure was issued under the *fiat*, or that any bond had been given for the forthcoming of the slaves to abide the final decree to be made under this second bill; but merely that a bond has been given to pay such costs and damages as he might sustain, &c. Now, without more, this does not tend to prove that the slaves mentioned in the bill of exceptions were within the custody of the law. No injunction against the husband's maintaining an action, or taking said slaves into his possession, if he can do so peaceably, has issued, and no process has issued authorizing Mrs. David, or the next friend who exhibited the

bill, to retain them. So that the plaintiff in the court below might maintain his action at law for the recovery of the slaves; and as the subsequent bill and bond do not affect in any way the legal rights of the parties, the record of them was properly excluded.

It may be that the bond conforms to the *fiat*, and thus leaves the slaves in the possession of Mrs. David, upon the security afforded by it, that they shall be forthcoming to abide the final order to be made in the cause; and the Chancellor, in the exercise of his enlarged discretion upon the subject of alimony, may order the services of slaves thus held to go towards the support of the wife, and in lieu of a provision for her *pendente lite;* but this is not shown by the bill of exceptions, and by this alone we must be governed. As the matter is brought to view by the record before us, there was no error in excluding the evidence of the second bill and bond.

5. It was alleged in the declaration, under a *videlicet*, that the chancery suit was dismissed on the 1st day of October, 1848, whereas, upon the production of the record, it appeared to have been dismissed at an adjourned term of said court held on the 20th September, 1850; and thereupon the defendants moved to reject the record of the chancery suit for the variance. The court being about to sustain the objection, the plaintiff was allowed to amend his declaration, so as to aver the true date of the dismissal, and it is insisted by the plaintiffs in error, that in thus granting leave to amend, the court committed an error.—We do not think so. It has been held that, where an amendment makes a new case, as where it introduces new parties, or a change of parties, it cannot be allowed after an issue is submitted to a jury.—Watkins v. Canterberry, 4 Por. Rep. 415.—But such is not the result here, and there was no reason for postponing the trial on account of it. It was discretionary with the court to allow it, and we doubt not that the discretion was properly exercised. Banister v. Weatherford, 7 B. Monroe 271-2, is an authority in point sustaining such practice.

6. We come next to consider the main point relied upon by the counsel for the plaintiffs in error, which is, that they should have been allowed to show in the court below that the complainant in the chancery suit, Mrs. David, was forced by the cruel treatment of her husband, the defendant in error, to abandon

him, and that the labor and services of these slaves had been applied to the support of the wife while thus separated from him, and were not more than sufficient for that purpose.

It is an unquestionable rule of law, that if a husband turn his wife out of doors, or by his misconduct compel her to leave him, she goes forth under such circumstances to the world with an implied credit for necessaries. In other words, he is bound to provide her with necessary lodging, clothes and subsistence, and in case of her sickness, medicines, medical attendances and reasonable expenses incurred during illness; and if he fails to make such provision, she may obtain the same on his credit, and the person so making it, may sue the husband and recover therefor. Roper on Hus. & W. 110, 111; McQueen on H. & W. 140; Clancy on H. & W. 28, 29; Story on Contracts 114 § 107; Chitty on Con. 173.

The position in the case before us is rested by the counsel on this principle. He contends that, as these slaves were placed in the possession of Mrs. David, and furnished her a necessary support, that consequently her husband is the debtor to the plaintiffs in error, to the extent of the value of that support, and in an action to recover for the hire of the slaves, or for the slaves and hire by way of damages, the defendant has the right to recoup the value of the support thus provided for the wife.

The doctrine of recoupment has been very ably discussed, and we are not disposed to gainsay the soundness of the authorities cited by the counsel for the plaintiffs in error. But there is a point which was not argued by the counsel, or noticed merely incidentally, which in our opinion renders the doctrine wholly inapplicable to the present case. It is this: conceding that the plaintiff in error would have a right to recoup for necessaries furnished the wife, in an action against him on the bond given by him as one of the next friends of the wife, can the indirect provision made for the wife's support by leaving these negro slaves with her, be regarded as providing necessaries for her, as that term is understood by the courts of law? We are clear, both upon principle and authority, that it cannot. We will not say that there are no cases where the wife might not claim as necessary the actual service of domestics, and bind the husband for their hire, but the case before us is not that; for here it is not claimed that the actual services of the slaves were

necessary to attend upon and aid the wife, but that "the labor and services of the slaves were applied to the support and maintenance of the said Milly David, and that the value of such labor and services was not more than sufficient for her necessary support and maintenance;" clearly importing that the labor and services of the slaves were necessary as the means of procuring a support, and not that they were required to be expended in the personal attendance upon the wife.

If the husband could be charged for such a provision made for the wife, it would in many cases prove ruinous to both husband and wife; for, if the slaves should be taken sick, or by mismanagement their labor should not only prove unproductive but bring their possessor in debt, the provision, however ample it might have been under other circumstances, would fail altogether, and yet the husband would be bound for the hire of the slaves. The law empowers the wife to contract for necessaries, but not for the means by which she may procure them, and which at the same time she may misapply to some other object, or which, if not misapplied, may prove expensive or profitable as they are improperly or providently employed. She is not to become a trader or planter, or carry on any business as the means of procuring a livelihood, upon capital furnished at the husband's expense; but he is the proper person to manage his own business, and to work his own slaves, being liable for her support.

There is no difference in principle between the wife's borrowing money with which to purchase necessaries and being furnished with slaves as the means for procuring them, except that the latter is liable to greater objection, arising from the precarious nature of the means employed, resulting from the liability of the slaves to sickness, or to escape from service, or from her incapacity to manage them profitably. Now it has long been the settled law, that money loaned to an infant or to a married woman is not to be regarded, *in a court of law*, as necessaries, even though it were expended in the purchase of such articles as the infant would have been liable for, had he purchased them on a credit, or the husband would have been bound for, had the wife thus purchased them.

In Earle v. Peale, Salk. 386, it was said by Parker, C. J., "a *feme covert* may buy necessaries, and her act may make the husband liable, but she cannot borrow money to lay out for ne-

cessaries. So it is with an infant. He may buy, but cannot borrow money to buy necessaries." The reason given is that they may misapply the money.

In Darby v. Boucher, Salk. 279, the money borrowed had been actually laid out by the infant for necessaries, yet held that he was not liable to the lender.

The same doctrine is asserted in Ellis v. Ellis, 5 Mod. Rep. 368, and is laid down by Mr. Roper in his treatise upon Husband and Wife, p. 112. In a court of equity, however, it has been held that the lender should be, as it were, subrogated to the rights of the party who furnished the necessaries. So in Havris v. Lee, 1 Pr. Wms. Rep. 483, it was said, "admitting the wife, *at law*, cannot borrow money though for necessaries so as to bind the husband, yet this money having been applied to the use of the wife for her cure and for necessaries, the plaintiff who lent it must stand in the place of the persons who found and procured the necessaries for the wife, and therefore, as such persons would be entitled to recover of the husband as his creditors, so the plaintiff shall stand in their place." The same doctrine was re-asserted in Marlow v. Pitfield, *ib.* 559. Mr. McQueen (H. & W. p. 141) says, "the furnishings must truly be *necessaries* within the meaning of the term as explained by the decisions;" citing Emmett v. Norton, 8 Car. & Payne 506; see also 2 Leigh's N. P. 1093, mar.

These authorities may suffice to show that, in leaving the slaves with Mrs. David, the plaintiff in error did not, in *legal* contemplation, furnish her with *necessaries*, so as to charge her husband *in a court of law*. How the matter should be viewed in a court of equity is a different question, and one upon which we express no opinion.

Having, therefore, made a provision for the wife, which in a court of law fails to charge the husband, we see no ground upon which the plaintiff in error can insist upon such provision by way of discount or abatement of the damage in the nature of recoupment. We are aware that, of late years, the courts, in order to avoid circuity of action, have been disposed to extend this doctrine to a very great length, but we think no well considered case has ever pushed it to the extent now contended for.—It is manifest that, if the plaintiff in error is allowed to recoup for the hire and services of the slaves in this action, he would

thus be enabled to do indirectly what the law forbids should be directly done, and we are aware of no principle which will justify this. It is true this bond is a contract to indemnify, but we think this furnishes no reason why we should give effect to a provision which the *law deems invalid*, so as to abate or entirely to defeat the recovery, but must remit the plaintiffs in error to a court of equity to establish their right, if any they have, on account of Mrs. D's use of the slaves. It follows from what we have said, that the court did not err in excluding the proof of the ill treatment of the wife by the plaintiff below, and of the application of the labor and services of the slaves to her support, &c.

7. We come next to consider the legality of the charges given, and those asked and refused by the court, and these may be briefly disposed of. In the first charge, the court instructed the jury that, if they believed the evidence, and believed that the negro slaves had been taken out of the possession of the plaintiff under said writ, and had never been restored to him since they were so taken, and if they further found that the plaintiff was entitled to recover, then the measure of damages was the value of the hire of said negro slaves, from the time they were first seized by the sheriff up to the time of trial, without any interest whatever on such value. It appeared that one of the slaves which had been taken under the process had died before the trial, but at what particular time, is not stated. We see nothing erroneous in this charge, prejudicial to the plaintiff in error. It is quite as favorable to his side, perhaps more so, than the law will warrant. It is clear that the death of one of the slaves does not affect the liability of the plaintiff in error for the hire, if he caused her to be taken from the defendant in error by a wrongful procedure.—5 Stew. & Por. 123; 8 Por. 564; 7 Ala. 807.

8. It was not incumbent on the plaintiff below to prove that the process, under which the slaves were seized, was sued out wrongfully, vexatiously and maliciously, as is supposed by the charge asked, nor was the record which was introduced evidence of itself that all these ingredients existed; but it was not necessary to entitle the plaintiff to a recovery upon the bond for him to show malice in suing out the process. It was sufficient if it was wrongfully sued out to enable him to recover the actual

damage he had sustained. Hence there was no error in the charge, which affirmed that it was not incumbent on the plaintiff to prove that it was wrongfully, vexatiously *and* maliciously sued out.

9. The second charge asked assumes, that the process must be shown to have been wrongfully obtained, and that the transcript of the record of the bill of chancery, and its dismissal for want of prosecution, did not show this fact. Although, as we have said, the first portion of this charge was clearly the law, yet, if the last portion of it asserts an illegal proposition, being asked as an entirety, the court was not bound to separate the legal from the illegal, but might properly refuse the whole. Was the transcript proof that the process was *wrongfully* sued out? We are clear, that it raises the *prima facie* presumption that it was, casting the *onus* on the other side to show that it was not. Upon principle, there appears to be nothing unreasonable in holding that a party, who has obtained the property of another by the aid of a court, granted upon allegations which, if true, entitle him to relief, and that aid is withdrawn by a refusal to prosecute his plaint, should, when sued for the property thus taken, be required to show that he had a just ground of complaint, and consequently, that the proceedings which he abandoned were not wrongful. *Prima facie*, he has made "false clamor," and having refused to maintain his suit, he virtually admitted, so far as that prosecution was concerned, that it was without foundation and wrongful. True, it does not conclude the complainant, who may bring another bill for the same cause: (3 Phil. Ev. C. & H. Notes, 926;) but, so far as that prosecution is concerned, it has ended adverse to the complainant, and has thus imposed on him the necessity of restoring what he has taken under the proceedings, or showing sufficient reasons why he should not do so. In Crocker & Wife against Bolling, adm'r, at the present term, we had occasion to determine upon the effect of a dismissal of a chancery suit for want of prosecution, as evidence in a suit brought to recover back money which had been received by the complainant in the bill, under a decree which had been reversed; and we there held, that the burthen of proof, showing a right to retain the money, by the reversal of the decree and dismissal of the bill, was cast upon the party who received it. The only difference

between the cases is, that, in this, property was received under an interlocutory order; in that, money was collected under a final decree which was reversed, and the bill afterwards dismissed for want of prosecution. But, we repeat, the mere dismissal of the bill, even had it been obtained upon a full hearing on the merits, would not establish malice, as was decided in Marshall v. Betner, 17 Ala. Rep. But this is an action on the bond, and no question as to malice is involved as an element of the right to recover.

10. The court was further requested to charge, that the plaintiff could not recover for the value and services of the slaves after the defendants with others gave a new bond, conditioned for the forthcoming of said slaves to abide the final decree, but refused so to instruct. We do not think this forthcoming bond affects in any way the plaintiff's right to recover upon the bond in suit. The giving of this second bond is a part of the proceedings in the cause, incidental to the exhibition of the bill and seizure of the slaves, and whilst it furnishes cumulative security for the forthcoming of the slaves, it in no manner lessens or affects the damages consequent upon the suing out the order of seizure. Moreover, the slaves having been taken from the plaintiff's possession by virtue of the process, to indemnify against the unlawful effects of which the bond in suit was executed, the plaintiff has the right to recover remuneration upon that bond, for the hire of the slaves down to the time of trial, as they had never been restored to his possession. This view also covers the last charge requested, but refused, which sought to limit the recovery for hire to the period preceding the dismissal of the bill. We can perceive no reason for stopping at that point, since the damage is continuous, and is as much the consequence of the improper seizure after the dismissal as before.

After the best consideration which we have been enabled to bestow upon this case, we have been unable to perceive any error in the several rulings of the court, and consequently the judgment must be affirmed.

UNION BANK OF TENNESSEE *vs.* BENHAM.

1. When a sheriff is ruled for failing to make the money on an execution, which he had levied on certain negroes as the property of the defendant, he may rebut the *prima facie* liability which his return raises against him, by showing that the negroes were taken from his possession under a writ of *habeas corpus*, and were discharged as free persons; and the writ of *habeas corpus* and proceedings thereon are admissible evidence for that purpose.
2. The question of freedom, as between master and slave, can only be tried in the manner prescribed by the statute, (Clay's Digest 542 § 19;) but when negroes are levied on by the sheriff, as the property of the defendant in execution, they may try the question of their freedom, as between him and them, by petition for *habeus corpus*.
3. When negroes which are not at the time held as slaves, are levied on and discharged, the sheriff, when ruled, may repel the presumption arising from the levy, by showing that they were free.
4. A slave voluntarily manumitted is liable to his master's antecedent creditors; but a child born in a free State, of a manumitted woman, is free, although its mother, on her return to this State, is subject to the debts of her former owner.

ERROR to the Circuit Court of Limestone.

Tried before the Hon. JOHN E. MOORE.

This was a rule against the defendant in error as sheriff, for failing to make the money on an execution in favor of the plaintiff in error against one Campbell, returnable on the second Monday in March, 1850. On the trial the plaintiff offered in evidence the execution, with the following endorsements: "Levied the within *fi. fa.* on a negro woman named Lucinda, and her two children Henry and George, as the property of Donald Campbell, 17th Oct., 1849."

(Signed) V. M. BENHAM, sheriff."

"The negroes, Lucinda, George and Henry, levied on by this *fi. fa.* were this day taken out of my possession by the coroner of Lauderdale County under a writ of *habeas corpus*, and were discharged from the levy by the Hon. the judge of the 4th judicial circuit of the State of Alabama, 24th Oct., 1849.

(Signed) V. M. BENHAM, sheriff."

Two other endorsements of a similar character were upon the

execution, to the effect that a levy was made upon the same negroes on the 10th November, 1849, and that they were taken from the possession of the sheriff by the coroner of the county, on the 5th January, 1849, under a writ of *habeas corpus* issued by the judge of the fourth judicial circuit, and were by him discharged on the 10th February, 1850, from the levy.

After the testimony on the part of the plaintiff had closed, the defendant offered in evidence the original writ of *habeas corpus*, which was as follows:

THE STATE OF ALABAMA, Lauderdale County. } To any coroner of the State of Alabama, greeting:

You are hereby commanded to take possession of the petitioners, Lucinda, George, and Henry Hewett, now detained in custody by Vincent M. Benham, sheriff of said county, and have them before me at 3 o'clock, P. M. on to-morrow, the 24th of October, at the court-house in the town of Florence, when and where the matters and things alleged in the said petition may be inquired of. Witness my hand and seal, 23 October, 1849.

(Signed) S. C. POSEY.

And the returns of the coroner endorsed thereon, as follows: "Rec'd 23 October, 1849. Thos. J. Crow, coroner. Executed this writ of *habeas corpus* by taking possession of said free persons, Lucinda, George and Henry Hewett, this 23 October, 1849." "THOS. J. CROW, coroner," &c.

Also, an order made by the said judge of the fourth judicial circuit on the 24th day of Oct., 1849, discharging said slaves from the levy of the execution, on the ground that the said Lucinda and Henry were proved to have been emancipated in the State of Ohio in Sept., 1847, and the said George was born after such emancipation; to which evidence the plaintiff objected, and the same was overruled. The defendant then offered in evidence another writ of *habeas corpus*, dated on the 2nd January, 1850, issued by the judge of the fourth judicial circuit, directed to the coroner, and commanding him to take into his possession the said Lucinda, George and Henry Hewitt, then detained in custody by Vincent M. Benham, sheriff &c., and to have them before said judge at 10 o'clock, A. M. on the 5th instant, at the court house, &c.; the return of the coroner to said writ, dated 5th January, 1850, that he had taken said negroes into possession: and an order of said judge, discharging said negroes from said

levy, on the ground of the former proceedings by *habeas corpus*, the judgment on which was in full force and effect. To all of which evidence the plaintiff also objected, but the objection was overruled. It was admitted that Lucinda and Henry Hewett, two of the negroes levied on, were in the month of September, 1847, carried by the said Campbell from this State to the State of Ohio, where they remained about three weeks, being there on the 20th September, 1847, and from there went to Indiana, where they remained seven months, and where George, the child of Lucinda, who was also levied on, was born; and that in November or December, 1848, the said Lucinda and Henry returned to Alabama, bringing with them the said George; and that Ohio and Indiana were free States. The defendant then offered a deed of *manumission* of the slaves Lucinda and Henry, executed by said Campbell, which is as follows:

Know all men by these presents, that I, D. Campbell of Florence, Alabama, from motives of benevolence and humanity, have manumitted and set free from slavery my negro woman Lucinda Hewett, aged about seventeen years, and her son Henry, aged about twelve months, both of whom are now in this city; and I do hereby give, grant and release unto the above named slaves all my right, title and claim, to their persons and services, and to the property they may hereafter acquire. In witness whereof, I have hereunto set my hand and seal, this 20th September, 1847. D. Campbell, [seal.]

To which the plaintiff objected, but which objection was overruled. It was also proved by the defendant that, at the time the execution was levied on said negroes, and for some months before said levy, they were living as free persons, not held in servitude by any one, and that the said Campbell, the defendant in execution, had removed to California in the spring of 1848.

After the defendant had closed his testimony, the plaintiff offered to introduce the petition of the said Lucinda and her children, for the writ of *habeas corpus*, which set forth, that they were illegally held in custody by the defendant in error, under the writ of execution in favor of the plaintiff in error against said Campbell, which had been levied upon them; that they were not the property of said Campbell, but free persons. The petition was addressed to the judge of the fourth judicial circuit, and prayed that a writ of *habeas corpus* might issue,

directed to the coroner, requiring him to take the petitioners into custody and bring them before said judge; which petition was dated the 23rd of October, 1849. Which evidence was objected to, and the objection sustained.

The plaintiff then offered in evidence another petition of a similar character, on the part of the said Lucinda and her children, dated 2nd January, 1850, which, after stating the same facts as the previous petition, set out said petition, and the proceedings thereon, and their discharge from their levy under such proceedings. This evidence was also objected to by the defendant, and the objection sustained.

Exceptions were taken to the decisions of the court upon the testimony, and the same are assigned for error in this court.

Ormond & Nicolson, for plaintiff in error:

The main question in the case is, whether the sheriff can justify his discharging the negroes under such an order; in other words, whether the whole proceedings were not *coram non judice* and void.

1. The act of emancipation was void, the owner being in debt at the time to plaintiff, for the bill was due 27th May, 1847, and the emancipation was not made until 20th September, 1847.—Clay's Dig. 542, § 18. It surely cannot be tolerated that one can put his creditors thus at defiance, by carrying his negroes to a free State, there liberating them, so as to prevent their being subject to his debts in the very State where his debts are contracted.

2. The court had no jurisdiction of the *habeas corpus* for the purpose of deciding the question of slavery *vel non*.—Field v. Walker, 17 Ala. 80; Thornton v. DeMoss, 5 S. & M. 609; Sam v. Fore, 12 S. & M. 413; Antoine v. DeLacy, 7 Leigh 438; Cable v. Cooper, 15 Johns. 152; Wise v. Withers, 3 Cranch 331.

3. If the court had no jurisdiction, then the sheriff is still liable, and cannot defeat the rule by setting up the judgment of the court in his defence.—8 Bac. Title Sh'ff. m.; Sewell on Sh'ff. 101; Brown v. Compton, 8 T. R. 435; 7 Martin 1, (new series); Spalding v. People, 7 Hill 301.

4. The return of the sheriff on the execution shows that the negroes were levied on as the property of Campbell; this has

never been altered or amended, and the sheriff is concluded by it.—Gov. v. Bancroft, 16 Ala. 613.

The sheriff by his levy acquired a property in the negroes, which could not be divested by a writ of *habeas corpus*.

L. P. & R. W. WALKER, *contra :*

1. In a suggestion against a sheriff, under the statute, that with due diligence he could have made the money on a *fi. fa.*, it is entirely competent for the sheriff to show, as well after as before the levy, that the money could not be made. The levy will not estop him from denying that the property seized was the defendant's. In taking it, he merely affirms that he believes it subject to the execution; and, when charged with the want of due diligence, it is simply his duty to show that he was mistaken.—Gov. v. Gibson, 14 Ala. 333; Leavitt v. Smith, 7 Ala. 175.

Prima facie, he would be charged on account of his levy; but he could discharge himself, as in any other case of tortious levy, by showing that the defendant had no property in the goods.—14 Ala. 333; Bristol v. Welsmore, 1 B. & C. 514; Whiting v. Bradley, 2 N. H. 498; 13 Mass. 224.

The levy is not regarded as conclusive evidence of the defendant's title; its effect is simply to raise a strong presumption against the officer, which he must repel by proof.—14 Ala. 343, and cases cited. And although he is not permitted to controvert his official return of the levy, he may prove facts *de hors* the return, in relation to his action under the execution, and which do not conflict, but are consistent with it.—14 Ala. 336; Evans v. Davis, 3 B. Monroe 346; Gov. v. Bancroft, 16 Ala. 605, 612.

Thus, although it was not allowable for Benham to contradict the fact of the levy, it was altogether permissible for him to show any supervening cause by which the levy was defeated or rendered unavailing; e. g., the discharge of the levy under the writ of *habeas corpus*.

2. As to the effect of the writ of *habeas corpus*.

The negroes levied on were taken out of Benham's possession by the coroner, by virtue of this writ issued by the judge of the Circuit Court. On its face it was regular; and the persons, process and subject matter were clearly within the cognizance

of the circuit judge. There was no excess ef jurisdiction (if at all) until the trial of the issue of freedom *vel non.*—Fields v. Walker, 17 Ala. 84.

The process, therefore, being regular on its face, and containing in itself no evidence of the want of jurisdiction, Benham was bound to obey its mandate.—5 Hill N. Y. 440; 18 Ala. 647 ; 3 Wilson R. 341 ; 14 Ala. 326–335 ; 7 Porter 67.

Nor was it any part of his duty to look outside of the writ.—If justified or implicated, it is by what appears on the face of the writ itself. He has no function of judicial discretion, nor the means of inquiry into the causes of action, or their character or legality, contained in the writs delivered to him for service. Obedience to all precepts, is the first, second and third part of his duty, and hence, if they appear regular on their face, and are issued by competent authority, he is protected in all that he does in the due execution of their requirements.—9 Conn. R. 146, Watson v. Watson ; 1 Conn. R. 40, Grumon v. Raymond *et al.*

The ground of these principles is simply this, that to the judge belongs the right to issue the writs, and to the sheriff is confided the duty of serving them.

Nor will the court, in cases involving the liability of the sheriff, ever look beyond the process itself, to see whether it is regular or irregular.—24 Wend. 487.

The general rule as admitted in Parker v. Walrod, 16 Wend. 519, is, if the judge has jurisdiction of the subject matter, (i. e. if he has the right to issue the *habeas corpus*, as distinguished from the right to try the issue of *libera vel non;* and that he has, see Fields v. Walker, 17 Ala. 80;) and if the process is regular on its face, he is protected. To require the sheriff to act or not, at his peril, as he may be supposed to know or not the technical regularity of the judge, is in conflict both with the reason and policy of the rule, and would be to act upon the presumption that the officer who executes is wiser than the judge who issues the process.—Webber v. Gay, 24 Wend. 487.

The writ of *habeas corpus* in this case, did not on its face disclose the purpose for which it was issued. It might have been issued (for aught that appears on its face) for a totally different object than to try the question of freedom *vel non.*

It, therefore, follows, should the foregoing views be correct,

that the court did not err in excluding from the jury the petitions referred to in the bill of exceptions.

3. But under the proof in this case, the action of the circuit judge was not beyond his jurisdiction, and the case of Fields & Walker, 17 Ala. 80, does not apply.

The statutory remedy of petition for freedom to the Circuit Court, applies only where the parties are, at the time, in servitude; i. e. to slaves, or those who are claimed as slaves, and consequently who are *prima facie* slaves. Where persons are enjoying freedom, and are deprived of it by arrest or otherwise, the remedy is by *habeas corpus;* otherwise, every free person of color in the State might, at the option of an execution creditor, be levied on, deprived of his liberty, sold as a slave, and be subjected to the slow process of petition to the Circuit Court to recover his freedom.

See particularly the language of the act. It establishes the distinction.—Clay's Dig. 542 § 19, 462 § 1; 17 Ala. 82. The statute (Clay's Dig. 468 § 39) only applies where the process is directed against the person of the defendant, as in cases of attachments, bail writs, &c.

The real question here was not the right to freedom, but whether these petitioners were illegally confined in custody, i. e. whether they were subject to execution. No person was claiming to be their master, no person was detaining them as slaves; which alone would authorize them, under the statute, to petition the court to be allowed to sue *in forma pauperis* to recover their freedom. The true question being the illegality of their confinement, its solution did not depend upon the inquiry whether they were properly emancipated, but whether, being emancipated, they are not liable to a charge which, if allowed, may or may not reduce them to their original state of slavery.—Ruddles, ex'r v. Ben., 10 Leigh 475.

The writ of *habeas corpus* applies to all cases of illegal detention of the person, except that which grows out of the relation of master and slave.—10 Leigh 476. And these petitioners, being emancipated and living in freedom, were clearly entitled to the writ.

Suppose the case put in Ruddles v. Ben., that the petitioners had sued Benham for detaining them as slaves, and had recovered in the action, still that decision would not have precluded

the creditors of Campbell for levying their executions; and, if denied the writ of *habeas corpus*, they would be driven, *toties quoties*, to the slow remedy by suit.

4. But independent of the proceedings on the writ of *habeas corpus*, Benham had the right to show any fact which would discharge him from liability by virtue of the levy; provided it was consistent with it.—3. B. Monroe 346. Thus he had the right to show that the negroes were not subject to execution, and in this view the deed of manumission was clearly admissible, connected as it was with proof of its execution in Ohio.—The effect of this proof was not to contradict the levy, but merely to show that in affirming the property to be Campbell's, the sheriff was mistaken.—16 Ala. 605; 1 B. & C. 514.

5. As to the exception which embraced the deed of manumission. The answer to this is, if the sheriff was bound to obey the writ of *habeas corpus*, then this exception cannot avail, because, even if well founded, it was an error without injury.—The *habeas corpus* being a complete defence, the erroneous admission of incompetent evidence on another branch of the case will not be cause of reversal; but independent of this, the deed was competent evidence, in order to show that the youngest child was born after the emancipation of the mother, and consequently was not subject to levy and sale. The petitions for *habeas corpus* were clearly inadmissible. The sheriff was bound to obey the writ if regular on its face, and could not look to anything behind it. The only object and effect of reading the two petitions were, to affect the sheriff with something behind the writ and not appearing on its face. Hence they were incompetent evidence.—14 Ala. 326, 332-35.

6. Carrying these negroes to Ohio with the intention of manumitting them, makes them free *ipso facto*, even without a deed of emancipation.—Law of Slavery 335-9, 348. And their return to Alabama does not make them slaves again.—*Ib.;* 7 Yerger 452; Bland & Woolfork v. Dowling, 9 Gill & Johns. 19. In this view of the case, conceding that there was error in permitting the deed of manumission to be read, still this court will not reverse, as the plaintiff sustained no injury by it.

7. It is clear that the child born after the emancipation and before the levy, is not subject to the execution.—Parks v. Hewlitt, 9 Leigh 511.

GOLDTHWAITE, J.—The first question presented upon the record, is, as to the admissibility of the two writs of *habeas corpus* and the returns thereon. In order to determine this question correctly, it may be necessary to advert to the character and position of the case at the time the evidence referred to was offered. The plaintiff in error was attempting to charge the defendant in error for failing to make the money upon a writ of execution against Donald Campbell, which he had received as sheriff. His own returns had been introduced, showing that he had levied the execution on certain negroes, on the 17th October, 1849, and again on the same negroes on the 5th January, 1850, the execution being returnable on the second Monday in March, 1850. A *prima facie* liability was thus raised against the defendant for the value of the negroes, which he could only relieve himself from by showing a state of facts which would repel the presumption arising from the levies.

It is insisted, however, on the part of the plaintiff in error, that the sheriff should not be allowed to make proof of this character—that it would be contradicting his return, which must be held conclusive against him, until set aside or amended. We do not understand the rule to go this length, (Bancroft v. The Governor, 11 Ala. 605;) but it is unnecessary to inquire into the correctness of this position, as we do not consider that this evidence tended in anywise to dispute or contradict the fact of the levy: it was matter entirely outside of it; and the case of The Governor v. Gibson, 14 Ala. 321, is conclusive upon the point, that testimony of this character may be admitted.

But it is said, that the proceedings under which the negroes were taken from the possession of the sheriff, and subsequently discharged, were void for want of jurisdiction, and for that reason they afforded no protection to the officer in yielding obedience to their mandate; that the proceedings were by *habeas corpus;* that the question involved was the right of the negroes to freedom, and that this question could not be tried in that mode.

It is true, that this court has decided, that when negroes are held in servitude and claimed as slaves, they cannot by *habeas corpus* try the right of the person claiming to be the master or owner to hold them, (Fields v. Walker, 17 Ala. 80,) and we are satisfied with the correctness of that decision; but it does not necessarily follow, that the question of freedom may not be tried

in that mode, where the relation of master and slave is not involved; and the reasoning of the judge who delivered the opinion of the court in the case referred to, is wholly inapplicable to a case where the right of the master, *as such*, is not litigated. The grounds on which the decision in Fields v. Walker is rested, are, that another remedy had been provided for the trial of that question, as between the person held in servitude and the person who claimed the right to his services as owner, the provisions of which appeared to have been framed with direct reference to the issue of freedom, as between them; and that, as in such case the question was one involving the right of the owner to his property, he was, under the constitution of this State, entitled to a trial by jury, which he could not have upon a *habeas corpus*, where the trial is by the judge alone. On referring to the statute providing for the suit for freedom, (Clay's Dig. 542 § 19,) it will be seen, that the owner is required to enter into bond and security for the forthcoming of the slave, in which case he remains in his *service* until the termination of the suit, and if out of his possession, the slave himself is required to give bond and security to make good to the owner such costs and damages as he may incur in consequence of the application; and these provisions, we think, show, that the remedy to which they belong, and which they form a part of, was not intended to apply to any other than the person standing towards the slave in the relation of owner. It may be said, that the sheriff, by the levy, occupies this position for the time being, and that the legislative remedy must be asserted against him; but it is not to be supposed that, in a case of this kind, the legislature intended the sheriff should give bond, or that by doing so he should become entitled to the services of the negro until the termination of the suit; that he should be kept in jail during that period, or that the rights of the plaintiff in execution should be jeoparded by the failure on the part of the sheriff to confine the negro, until he could be sold. A sufficient answer is, however, as we think, to be found in the nature of the right which the sheriff acquires by the levy. He gains no right to the *use* or *service* of the slave, but a mere right to keep and sell, and the law regards him as the owner, only so far as may be necessary to maintain this right. He holds him only as subject to the execution.

We apprehend that it would hardly be contended, that a

white man not held in servitude, if levied on by the sheriff, and confined in jail, could not try the legality of his confinement by *habeas corpus*. Would the fact that he was levied on as a slave deprive him of the benefit of this writ, and drive him to the slow process of the statutory suit for freedom? The issue before the judge upon the *habeas corpus*, would be the legality of the confinement, and this, it is true, would incidentally involve the question of slavery; but no right of the master or owner would be involved, and the judgment of the court discharging the party from his confinement, would prove nothing whatever, upon the issue of freedom, between him and one claiming to be his owner; and if such would be the rule in relation to a white man, there would be no difference of principle in its application to a free person of color. In every case in which the latter is confined, he has the right to try the legality of his confinement, except in the single case where he is held as a slave by some one claiming the right to his services as master or owner, in which case, the legislature has, from motives of the soundest policy, prescribed a different remedy.

We have said nothing as to the constitutional ground on which the case of Fields v. Walker was put, as it obviously has no application to a case where the question of ownership is not involved.

It results from the views we have expressed, that the magistrate had jurisdiction to try the legality of the confinement of the negroes levied on, provided it did not touch the relation of owner; and as it does not appear from the proceedings, that this question was involved, we cannot say that they were without jurisdiction; and as they were valid upon their face, they afforded a protection to the sheriff.

The next question arises upon the action of the court below in admitting the deed of manumission. The general principle that the sheriff may defend himself against a rule for failing to make the money, by showing that the defendant in execution had no property out of which the money could be made, is a proposition no one can doubt; and our own decisions go to the extent that this may be done after levy, if it is shown that he has released the property or returned it to the true owner.—Leavitt v. Smith, 7 Ala. 176; Macon v. Watts, *ib.* 703. The principle of these decisions is, that the sheriff, by levying upon

the goods of a third person, becomes a trespasser, and being so, the law does not impose on him the duty of holding them, after he has ascertained their true ownership. We can see no distinction between a levy made on free persons of color, not held as slaves at the time of the levy, and goods proper not belonging to the defendant in execution. In either case, the sheriff would be responsible in damages; and in the first case, we can conceive of no valid reason why he should be bound to retain the negroes after ascertaining the fact of their freedom, which would not require him to retain property belonging to a third person. The statute providing the mode in which a person held as a slave may try the question of slavery, is confined to such person only, and does not affect the right of the sheriff to try that question, when the proceeding is against him, and it is involved in the issue which he makes. It may be that these principles would not apply to a case where the negro levied on was held as a slave by the defendant in execution, or by one deriving title from him during the continuance of the execution lien. This question is not presented upon the record before us, as the evidence set forth in the bill of exceptions shows that the negroes levied on in this case did not occupy that position. They were not held as slaves at the time of the levy; and we would be understood upon this point as limiting our decision to the case made by the record, and as deciding only, that where negroes not held as slaves are levied on and discharged, the sheriff, when ruled for failing to make the money, may repel the presumption arising from the levy, by showing that the negroes were free.

The execution in the case under consideration, was upon a debt which was due before the act of manumission; and under these circumstances, as that act was not based upon a valuable consideration, it was simply a gift of freedom to the slaves, and must be governed by the same rules that apply to other gifts. These considerations, however, do not apply to the child George, who was born in a free State, and after the execution of the deed of emancipation. The condition of the mother at the time of his birth was that of freedom. She was liable, it is true, to be subjected into slavery to satisfy the claims of antecedent creditors, but this could not be done until such creditors had obtained a lien, and until that contingency happened, she must be regarded free to all the world; and the child born while she was

in that condition, would, as a matter of course, follow the *status* or condition of the mother at the time of the birth.—Parks v. Hewlett, 9 Leigh 511. In this aspect, and for the purpose of showing that one of the negroes levied on was free, the deed was properly admitted.

It only remains to consider whether the court below erred in refusing to admit the petitions for the writs of *habeas corpus*. So far as the jurisdiction of the proceedings was concerned, we have already considered that question, in the previous part of the opinion, and as they could have been introduced only for the purpose of showing the want of jurisdiction, whether they were admitted or not, would make no difference in this respect.

There is no error in the record, and the judgment is affirmed.

FIELDS *vs.* WALKER ET AL.

1. A plea to the jurisdiction, when pleaded in a court of general jurisdiction, is bad on demurrer, if it does not point out what other court has jurisdiction, and conclude with the prayer "whether the court will or ought to take further cognizance of the plea aforesaid."
2. Matter amounting to the plea of *res adjudicata* cannot be pleaded in abatement.
3. Where the claimant of slaves institutes proceedings for their recovery under the act of Congress of February 12, 1793, as fugitives from his service, and obtains the certificate of the justices in his favor, as required by the act, the proceedings can only affect those who are arrested by the warrant of the justice and brought before him; and although the certificate declares that certain other persons, children of a woman who was arrested and remanded as a fugitive slave, are also slaves, and owe service to the claimant, yet, as to them, the sentence is a nullity.
4. In a suit for freedom under the statute of this State, the trial being had on one issue as to all the petitioners, evidence of what a deceased witness testified on a former proceeding under the act of Congress of 1793, to which only a portion of the petitioners were parties, is not admissible.
5. Children born in this State, of a negro woman who is a fugitive slave, cannot be regarded as fugitive slaves, or slaves which have escaped from service in another State, within the meaning of the constitution of the United States, and of the act of Congress of 1793.
6. Appearance and consent cannot give jurisdiction.

APPEAL from the Circuit Court of Tuskaloosa.

Tried before the Hon. ANDREW B. MOORE.

John Walker and the other defendants in error, who are his brothers and sister, filed their petition for freedom, under the statute of this State, against the appellant, in the Circuit Court of Tuskaloosa County; setting forth that they are free persons of color, the children of Milley Walker, who is a free woman of color; that they were born in this State, and under its laws are entitled to be free, their mother being free at the time of their birth; that they are unjustly held in bondage, and claimed as slaves, by the appellant. They pray that the question of their freedom may be tried as the statute directs; that they be declared free by the judgment of the court, and released from their present bondage by its order. The petition also sets out the proceedings on a former petition for freedom, exhibited in the Circuit Court of Tuskaloosa County, by Milley Walker, the mother of petitioners, for herself and the present petitioners, against one Richard Jones, who held them in bondage and slavery, on which, by the finding of a jury, and the judgment of the court, they were declared free persons of color, at the September term, 1833, of said court. The appellant in this case was not a party to those proceedings.

To this petition, Fields, the appellant, appeared, and pleaded:

1. That said petitioners are his slaves, and owe him service as such, and were his slaves at and long before the petition was filed.

2. For further plea, he says "that this honorable court cannot rightfully take jurisdiction of this cause, and have and determine the matters alleged in said petition, because he says, that, heretofore, to wit: on the 29th day of November, 1848, the petitioners were seized and arrested, in the State of Alabama, by the defendant (then and now a resident citizen of the State of Virginia) as his slaves, and owing him service as such, and as such slaves they were taken before three magistrates, who were acting justices of the peace for the County of Tuskaloosa; and under the act of Congress passed the 12th day of February, 1793, entitled 'An act respecting fugitives from justice, and persons escaping from the service of their masters,' the defendant produced before said magistrates satisfactory

proof, that the petitioners were the slaves of said defendant, and had escaped from his service; whereupon the said magistrates executed and delivered to the defendant the certificate required to be made by said act of Congress, by said magistrates, that the said petitioners were slaves of the defendant, and owed him service as such. All which the said defendant is ready to verify by the certificate aforesaid."

The certificate referred to in the plea is in these words:

THE STATE OF ALABAMA, Tuskaloosa County. } Be it known that, on the 29th day of November, 1848, Milley, and her children John, LeRoy and Priscilla, were arrested by virtue of a warrant issued by James L. Childress, a justice of the peace in and for said county, as fugitive slaves, and brought before us, James L. Childress, justice of the peace as aforesaid, and Frederick P. Hall and L. S. Skinner, two justices of said county, and claimed as slaves and owing service as such to Richard W. Fields of Brunswick county, in the State of Virginia; and after an investigation of two days, both parties represented by counsel, we were satisfied by the proof adduced before us, that the negroes, Milley and her children, Armistead, Eliza, John, LeRoy, Priscilla and Stephen, are slaves under the laws of the State of Virginia, from which State the said Milley fled, or was stolen, before the birth of her said children, and that said slaves owe service to Richard W. Fields of said State; and we hereby certify the same, that the said Richard W. Fields, or his legally authorized agent or attorney, may remove said slaves to the said State of Virginia, where he resides.—Given under our hands and seals, this 12th day of December, A. D., 1848."

(Signed,) JAMES L. CHILDRESS, J. P. (*seal.*)
F. P. HALL, J. P. (*seal.*)
L. S. SKINNER, J. P. (*seal.*)

To the second plea of the defendant the petitioners filed a demurrer, in which there was a joinder by the defendant.

The defendant withdrew his first plea, by leave of the court, and against the objections of the counsel of the petitioners. The court sustained the demurrer to the second plea, and allowed the defendant to plead over. What plea was put in under this order, the record does not show. The issue was tried by a jury

which found for the petitioners, and judgment was rendered accordingly.

On the trial, a bill of exceptions was sealed at the instance of the counsel for the defendant, by which it appears that on the trial of the issue, the defendant proved the death of one Wyatt, who had testified on the proceedings before the justices under the act of Congress, and offered to prove what said Wyatt had sworn on that occasion; this was objected to by the counsel for the petitioners. The objection was sustained, and the defendant excepted.

The judgment of the court on the demurrer, and the exclusion of the testimony as set out in the bill of exceptions, are here assigned for error.

Ormond & Nicolson, for plaintiff in error:

The special plea in bar presents the naked question of the sufficiency of the certificate of the magistrates under the act of Congress of 1793. The certificate shows that the slaves were brought before the justices, upon an allegation of Fields, a resident citizen of Virginia, that they were his slaves, owed him service as such, and had escaped from his service. The jurisdiction of the magistrates, then, was complete, and their decision cannot be reviewed by any State court.—Jack v. Martin, 12 Wendell's R. 311; Same v. Same, 14 *ib.;* Prigg v. Pennsylvania, 16 Peters' R. 539. The plea is not a plea to the jurisdiction: it could not, in truth, have said that any other court had jurisdiction.--Rhea v. Headen, 3 Mass. 24, and cases cited in note.

When this case was before this court at a previous term, it was held, that the question of slavery *vel non* could not be tried under a writ of *habeas corpus*, and the court expressly disclaimed any intention of deciding this question. Yet the court below considered that this court had intimated that the Circuit Court could take jurisdiction and try this question, and for that cause decided the demurrer against the claimant. If there is any meaning in language, the openning paragraph of the opinion excludes any such idea; and it cannot be supposed that, after such an unequivocal disclaimer of any design of passing on the question, the court should afterwards, by indirection, have decided it. Not doubting, therefore, that this is an open question, we proceed to consider it.

The act of Congress of 1793 employs the term "fugitive from labor." The language of the constitution is, "No person held to service or labor in one State, under the laws thereof, escaping into another, shall," &c. The act of Congress was intended to make this constitutional provision effectual, not to limit or restrain it; nor could Congress, by any act, limit or restrain the concession made in the constitution to the slave-holding States. But, it is contended, the petitioners cannot be considered fugitives from the service of their master, because they never were in the State of Virginia, but were born in this State, their mother having run away from Virginia many years since. The question is to be settled by the true construction of the constitution. What was the intention of its framers? What did the southern States demand, and the northern States concede? The difficulty apprehended, and intended to be provided against, was, that, if the comity of nations was the master's only guaranty, he might not be permitted to reclaim his fugitive slave. To secure this, it is provided that, if a slave "escapes" into another State, he shall be delivered up, on demand of his owner. What is the meaning of this term, "*escape?*" In what sense is it employed? On the other side it is contended, that it must be literally and strictly construed, and that a slave cannot "escape" from a State in which he never was. We contend, that the organic law must be liberally construed, to effectuate the plain intention of the parties; that when the intention is clear, courts will put that construction on it which will give it that effect. The guaranty was, that, where A's slave was found in another State, and refused to return to his service, he should be delivered up to him. The term "escape" was used to negative the idea of his consent to the slave's going or remaining in another State.

It is contended, however, that "escape" implies an act of the will. But, if a slave is stolen, and carried across the line of the State, with or without his will, or, if an infant incapable of volition, is carried by its mother to another State, can it be possible that the constitution does not provide for these cases? Surely, the mischief intended to be remedied by the constitution was, that the southern slave-holder should not be molested in the recovery of his slave, by the laws or authorities of another State, in which he might be found. The only question would be,

whether he was in fact a slave, and the property of the person claiming him. If so, he had, in the sense of the constitution, escaped from his service, and would be, literally, a fugitive from the service of his master, if he refused to submit to his commands.

These cases show conclusively that the constitution should not be construed literally. Suppose the case of a stolen slave. How could the master show the consent of the slave to go? And in the case of the infant, "escape," literally, would be impossible. Yet who can doubt that these cases are within the spirit and intent of the law? As the mother of the slave in this case escaped from the service of her master, her children, following her condition, are fugitives from his service, precisely to the same extent she is, and covered by the spirit and meaning of the constitution and the act of Congress. In the construction of statutes, it has always been held, that a thing within the intention of its framers is as much within the statute as if it were within the letter, and that a thing within the letter is not within the statute, unless it is within the intention of the makers of it; and whenever the meaning of words is obscure or doubtful, the intention of the legislature must be resorted to, to find the meaning of the words.—6 Bacon's Abr., Title Statute, I, 5. How much more are these rules applicable to the organic law, which must, of necessity, be general in its terms. As, therefore, the clear and obvious intention was, to secure the slaveholder against interference on the part of the States, preventing the reclamation of his slave, such a construction must be put upon the law as will secure this end, without which the constitution never would have been assented to by the slave-holding States. This being the true construction, the court should have declined jurisdiction, as the decision of the tribunal created by Congress is paramount to all State law and authority.

The proof offered in the court below, of what a deceased witness testified on the trial before the justices, was improperly rejected, the necessary preliminary proof having been made. Whenever testimony is given upon oath, in a judicial proceeding in which the adverse litigant was a party, and had the opportunity to cross-examine, proof of what such witness swore may be made after his decease. All these conditions exist in this case, and the evidence, therefore, should have been received.—1

Green. Ev. §§ 163, 164, 165, 166. The trial before the justices was certainly a judicial proceeding; the court before which the trial was had was also one of peculiar and extraordinary jurisdiction, and one from whose decision there was no appeal.

E. W. Peck, *contra:*

I. The demurrer to the plea to the jurisdiction of the court was properly sustained, because: 1. The plea to the merits admitted the jurisdiction of the court. 2. The leave asked by the plaintiff to withdraw his plea to the merits admitted the jurisdiction of the court. 3. The defence attempted to be made by this plea, if available at all, should have been made on a plea to the action.—1 Chitty's Pl. top p. 444; 3 Mass. R. 24; 6 East 583.

The said plea is bad on the merits. It does not aver that the defendants owed the plaintiff service in the State of Virginia, or in any other State out of Alabama; nor does it aver that they were his slaves, and had escaped from his service in one State, and fled into another. It states that the magistrates certified, "that the said petitioners were the slaves of the said defendant, and owed him service as such, to-wit, on the 12th of December, 1848, at the county aforesaid": such certificate is wholly insufficient, and in no essential particular does it conform to the act of Congress. The plea does not aver that the defendants ever were in the State of Virginia, or in any other State than Alabama. It is wholly defective as a plea to the jurisdiction: it wants the certainty required by such pleas, and is deficient in substance. As a plea in bar, it is wholly defective and insufficient, because, as such, it should have averred that the issue was the same, and the cause identical. As a plea of *res adjudicata* it should have averred all that was necessary to show that the proceeding was within the act of Congress. The matter before the magistrates was, among other things, whether the alleged slaves were fugitives; here, the issue is simply, slavery *vel non.*

II. The certificate set out on oyer was a nullity. It does not show that the magistrates had jurisdiction. This should appear on the face of the certificate. In such cases, magistrates exercise a special and limited jurisdiction, and their proceedings must, therefore, show all that is necessary to sustain their juris-

diction.—Wise v. Withers, 3 Cranch 331, 337; Lamar v. The Comm'rs Court of Marshall Co., at this term. The intendment of law is, that courts of general jurisdiction, when they act, have jurisdiction; but with regard to inferior courts, or those of limited and special jurisdiction, those who claim any right or exemption under their proceedings are bound to show affirmatively that they had jurisdiction.—19 Johns. R. 33; 1 Saunders' R. 74, and notes.

III. The claimant of a slave, to avail himself of the constitution and laws of the United States, must bring himself within their plain and obvious meaning: the language employed will not be extended by construction.—18 Pick. R. 221. The constitution and act of Congress are confined to the case of a slave *escaping* from one State, and fleeing into another.—Prigg v. Com. Penn., 16 Peters' R. 628, 638; Jones v. Van Zant, 5 How. U. S. R. 228; Commonwealth v. Holloway, 2 Serg. & R. 305; *Ex parte* Simmons, 4 Wash. C. C. R. 396. The court will examine the alleged certificate, and must pronounce it valid or void, as it does or does not conform to the act of Congress.—*In re* Clarke, 9 Wendell's R. 212.

The case of Jack v. Martin, cited by plaintiff's counsel, is wholly unlike this. In that case, the act was passed for the express purpose of enabling a slave to sue out the writ named in it, to defeat the owner from carrying off the alleged slave under the act of Congress. It is an act of a free State. The statute under which this proceeding is had, is a general law, to enable persons claimed as slaves to try the question of slavery *vel non*. But the act of New York clearly shows that there must be an escape from one State, and a fleeing into another, which there was not in this case. The act of New York is unconstitutional; ours certainly is not.

IV. Jones had the defendants in his possession, claiming them as his slaves, as a purchaser for valuable consideration, for a period that barred the claim of Fields. When the petition for freedom was filed in 1832, Jones' title was not only adverse, but perfect, as against all the world except the defendants. Fields, then, could not have recovered them, by any proceedings against Jones. The defendants have overthrown the title of Jones, by the recovery in 1832; they cannot be in a worse condition by reason of that recovery, nor can Fields be in a better condition.

The defendants, then, are entitled to set up the title of Jones, and their recovery against him, against the present claim of Fields.—See the last paragraph of the opinion in Fields v. Walker, 18 Ala.

V. The offer to prove what the witness Wyatt swore on the examination before the magistrate, was properly rejected.—Gildersleeve v. Caraway, 10 Ala. 262; Melville v. Whiting, 7 Pick. R. 79.

LIGON, J.—It is insisted that the court erred in sustaining the demurrer to the second plea of the defendant in the court below.

This plea was evidently intended as a plea to the jurisdiction of the court, and must, therefore, be regarded a plea in abatement, since all pleas to the jurisdiction are pleas in abatement. In this aspect the plea is bad, both in its form and matter. In form, because it neither points out what other court has jurisdiction, nor does it conclude with the prayer, "whether the court will or ought to take further cognizance of the plea aforesaid," both of which are necessary in pleas to the jurisdiction, when pleaded in superior courts, or courts of general jurisdiction.—3 Chit. Pl. 894; Rea v. Heyden, 3 Mass. 24; 1 Chit. Pl. 144; Mosely v. Hunter, 3 Iredell 403. The matter attempted to be set out in the plea, if available at all, amounts to the plea of *res adjudicata*, and as such should have been pleaded in bar, and not in abatement. For these reasons, we are of opinion there was no error in sustaining the demurrer.

The next error assigned arises out of the ruling of the court in relation to testimony offered by the defendant. It appears by the bill of exceptions, that, on the trial before the justices of the peace in November, 1848, had, as the certificate of said justices shows, under the act of Congress of February 12th, 1793, one Wyatt testified for the claimant of the slaves arrested under a warrant issued by James L. Childress, a justice of the peace, and that Fields the defendant in this suit was the claimant in that. It was further shown, that said Wyatt had departed this life before the trial in this case. The defendant, after showing the death of Wyatt, proposed to prove what he had sworn on the former trial. This was objected to by the counsel of the petitioners, and the objection was sustained by the court,

because the proceeding under the act of Congress was not such a trial as would authorize such proof to be made.

On an examination of the certificate of the justices, who presided on the arrest of Milley Walker and others, on the claim of Fields, the defendant in this suit, it appears that Milley, John, LeRoy and Priscilla were the parties brought before them on the warrant of arrest issued under the act of 1793, and claimed by Fields, as fugitives from service or labor, under that act, and that the trial then had related to the persons so arrested. If this trial were conclusive as to these, still it cannot be pretended that it could in anywise affect the rights of those of the present petitioners who were not so arrested. The petitioners in the present case are John, LeRoy, *Stephen*, Priscilla and *Armistead* Walker. Milley is not here a party, nor were Stephen and Armistead arrested on the warrant of the justice of the peace. The parties, therefore, are not the same; and for this reason, if no other, the testimony, as to what Wyatt deposed before the justices, was rightly excluded.

It is true that the certificate of the justices, after reciting a trial before them between Fields as claimant, and Milley, John, LeRoy and Priscilla, as parties arrested and brought before them, goes on to adjudge that these persons, as well as Armistead, Eliza and Stephen, are slaves under the laws of Virginia, and owe service to Fields, the claimant. But we apprehend that such a sentence, as to the three parties last named, cannot be supported, and that it is a nullity, inasmuch as the record does not show that they were before the court, or had any opportunity to defend against the claim. The court rendering the sentence is one of special jurisdiction, and no intendment can be indulged in favor of the regularity of its proceedings.

Of the parties who were not then before the justices, and who were consequently not concluded by their judgment, two are here petitioners for freedom; and as the trial appears to have been on one issue as to all the petitioners, evidence of what had been testified on a trial to which only a portion of them were parties, is not admissible.

Again: It does not appear that the proof was offered in reference alone to the two petitioners for freedom who appear to have been arrested and brought before the justices, but that it was offered generally as to all the parties; and when this is the

case, it matters little whether on separate issues it would have been good as to some of them. The court is not bound to separate it, but may reject the whole, and it will not be error.

There is, however, another reason why the testimony offered should not have been received, and that is, that the questions arising on the proceedings before the justices of the peace under the act of 1793, and those arising in this suit, are materially different.

The questions which the magistrates of the several States, under the third section of the act of 1793, are allowed to consider, are, 1st. Are the parties claimed held to labor, and do they owe service or labor to the claimant, under the laws of a different State from that in which they are arrested? 2d. Have they escaped from such service?

The evidence before the magistrate must be directed to these two points; and when it is shown by the claimant that the persons claimed are of African descent, and that, by the laws of the State from which the persons arrested are alleged to have escaped, such persons are allowed to be held in slavery, and that those claimed have been so held by the claimant, this will show that they owe him service in that State, and, on this branch of the inquiry, entitle him to the certificate required by the act of Congress. But it does not satisfy the demands of the second branch of the inquiry, on the existence of which, conjointly with this, the jurisdiction of the magistrate depends, viz., has the party escaped from such service in the State in which the owner resides?

The verb to *escape* is defined by Mr. Walker, "to fly, to avoid, to pass unobserved;" and the noun *escape*, "flight, the act of getting out of danger; *in law, violent or privy evasion out of lawful restraint.*" The term "escape" presupposes a former confinement or abiding in a certain place or condition, out of which a party delivers himself by his own act, or is delivered by the act or aid of another with his concurrence. If the parties claimed in the case before the magistrates, under the act of 1793, are not shown to have escaped, in one of these senses of the term, from the service of the defendant in the State of Virginia, then it is clear that the magistrates had no jurisdiction, and their action in respect to these petitioners is not binding upon

them. If this is the case, then no testimony offered on that trial can affect them on this.

In the certificate of the justices it appears, that Milley, the mother of these petitioners, "*fled, or was stolen* from the State of Virginia, *before the birth of her said children.*"

Now let us inquire what is the condition of the children of Milley, all of whom, it appears, were born after she had escaped from the service of Fields, and fled out of the Commonwealth of Virginia. Are they fugitives, who have escaped from service or labor in another State, when they were never within the limits of that State, or subject to its laws? The mere statement of the proposition seems to suggest the answer, that they cannot be so regarded.

In the case of The Commonwealth v. Holloway, 2 Serg. & R. 305, the question was, whether the child of a fugitive slave, born in Pennsylvania, more than twelve months after she had escaped from Maryland, and resided in the former State, was bond or free. By the laws of Pennsylvania, all children born within her limits are free, irrespective of color; while by the laws of Maryland, the children of a slave mother are themselves slaves. The Supreme Court of Pennsylvania held, that the child was free, notwithstanding the bondage of the mother, and while the latter was readily surrendered under the act of 1793, the child was retained, because it was entitled to its freedom.

Our own court, at its present term, has held that, where a master who was indebted, and against whom judgments were obtained, carried his female slave to the State of Ohio, and there emancipated her; and she, seven months after her emancipation under the laws of Ohio, brought forth a child in the State of Indiana, another free State, such child was absolutely free, although the mother, on her return to this State, would, under our statutes, be subject to the debts of the master, existing at the time she was taken from this State for the purpose of emancipation.—Union Bank v. Benham, at the present term.

These citations are made to show, that all the incidents of the mother's condition at the time of the birth of the child do not invariably attach to the offspring. In the former case, although the *status* of the mother was that of a fugitive slave, and her slavery, under the constitution of the United States and the acts of Congress, attached to her as well in Pennsylvania as in Ma-

ryland, and this could not be affected by any State legislation whatever, yet the child, being begotten and born in a free State, was entitled to the protection of its laws, and could in no just sense be said to have escaped from service in Maryland. In the latter, the mother of the child, although free in Ohio and Indiana, was made so by the act of a debtor, which, by our laws, is regarded as a fraud on the rights of his creditors, and consequently void as to them, should the slave thus emancipated return within the jurisdiction of this State. Yet, notwithstanding the mother's *status*, on her return to this State, was that of slavery, so far as the creditors of her former master are concerned, this incident of her condition did not attach to the child born in Indiana after her emancipation, although she brought it here with her.

So, in this case, notwithstanding the mother of the petitioners may be a fugitive slave who escaped from the service of her master in Virginia, yet the petitioners, although in this view of the case they would be slaves, because they were born of a slave mother in a State where slavery exists by law, cannot be regarded as *fugitives*, or slaves which have *escaped* from service in another State, within the meaning of the constitution of the United States, and the act of Congress of the 12th Feb. 1793.

By that act, the magistrates of the several States are vested with power and jurisdiction only over persons who have *escaped* from service or labor in one State, and have fled to another.—U. S. Statutes at large, vol. 1, ch. 7, p. 302-3-4.

It does not appear that the petitioners in this case can, in any just sense of that term, be said to have *escaped* from the service of Fields, in Virginia; and as to them, the proceedings before the justices of the peace in Tuscaloosa county are wholly without authority of law. As it is shown that Wyatt, the deceased witness, had been examined only in that proceeding, there was no error in excluding proof of what he then swore, from the jury, on the trial of this case in the court below, because the only matter which could lawfully arise on the trial before the justices, must relate to Milley Walker alone.

It is said, however, that the certificate of the justices shows that the parties appeared and contested the matter before them, and therefore they have submitted to their jurisdiction, and will not be allowed to repudiate it. We have seen that they had no

jurisdiction over the subject matter of any litigation which could arise between the parties to this record, on the question of service due from one to the other, and no consent could possibly bestow it upon them. But it is not true that the record of the justices proves the appearance before them of all these petitioners, and a contest with the defendant on that occasion. A part of them, with their mother, are said to have been heard by counsel, though not all. This, however, is a matter of small importance, as it could not have conferred jurisdiction.

The appellant in this case had no greater right to proceed against the children of Milley, who were born in this State, under the act of 1793, than he would have had to use that act for the recovery of slaves bequeathed to him here, while he was a resident of the State of Virginia. In either case, he might take possession of them peaceably, without any process whatever, wherever he could find them; and if they were withheld from him, the laws and process of this State were at his command to enforce his right, or, if the value was sufficient to give the Federal Courts jurisdiction, they too were open to him. But as the petitioners in this case had never escaped from labor or service in Virginia, they could not be proceeded against under the act of 1793.

There is no error in the record, and the judgment is affirmed.

JEMISON *vs.* THE PLANTERS' AND MERCHANTS' BANK.

1. In a summary proceeding under the statute, by a Bank whose charter has been forfeited, and her affairs placed in the hands of trustees for settlement and liquidation, the notice having been held defective on error, for the want of an averment that the suit was instituted by the direction and authority of the trustees, the court below to which the cause is remanded may permit an amendment of the notice by the addition of that averment.
2. The amendment may be made in such case by annexing the trustees' certificate to the notice, averring that the Bank, "by its trustees named in

the certificate annexed hereto, appointed under the act therein specified, will move," &c.

3. Where the affairs of a Bank are by statute placed in the hands of trustees for settlement, after a judgment has been rendered on *quo warranto* against the Bank declaring its charter forfeited, the subsequent reversal of that judgment does not affect a suit previously instituted by the trustees against a debtor of the Bank, nor can he take advantage of that reversal to protect himself against the rendition of judgment.

4. The act of 1850, (Pamphlet Acts 126 § 2,) which directed a sale of the remaining assets of the Planters' and Merchants' Bank of Mobile, does not repeal by implication the act of 1845, which authorized the appointment of trustees to settle its affairs, and gave them power to use all the remedies to which the Bank, while in existence, was entitled; and a sale pursuant to that act, of notes then in suit, does not affect the further prosecution of it for the benefit of the purchaser.

5. In a summary proceeding by notice and motion against a Bank debtor, if the proper certificate is appended to the notice, that the note is really and *bona fide* the property of the Bank, the certificate is proof of the jurisdictional fact to the end of the suit, although the note is sold or assigned before judgment.

6. The trustees of the Planters' and Merchants' Bank of Mobile, appointed under the act of 1845, were authorized to take individual notes to secure a balance due to the Bank from a suspended Bank of another State, and to institute suit thereon by the summary remedy of notice and motion.

7. The Mississippi statute of 1840, (Hutchinson's Code 324, *et seq.*) which forbid the Banks of that State to "transfer by endorsement or otherwise any note, bill receivable, or other evidence of debt," is unconstitutional, being in violation of the section which declares that no State shall pass any law impairing the obligation of contracts.—(Constitution U. S., Art. 1, Sect. 10.)

ERROR to the Circuit Court of Mobile.

Tried before the Hon. LYMAN GIBBONS.

This action was commenced at the Fall term, 1846, of the Circuit Court of Mobile, by a notice of motion in the name of the Planters' and Merchants' Bank against the plaintiff in error, for a summary judgment on two notes executed by said Jemison, each for the sum of $4,189 75, with interest from the first day of January, 1842, dated Columbus, Mississippi, April 5, 1842, and payable to the order of Eli Abbott, one on the first day of January, 1844, and the other on the first day of January, 1845.

To the notice was appended the following certificate: "We, Hindman Barney, David Stodder and Henry Goldthwaite, trustees of the Planters' and Merchants' Bank of Mobile, under an

act entitled "an act to amend the laws heretofore enacted for the final settlement of the affairs of the Planters' and Merchants' Bank of Mobile," approved January 24, 1845, do certify, that the debt specified in the notice aforesaid, is really and *bona fide* the property of said Bank. Witness our hands," &c.

The defendant appeared, and pleaded: 1. *Non assumpsit;* 2. That there was no such corporation in existence as the said Planters' and Merchants' Bank of Mobile; 3. That said notes described in the notice were given by defendant to the Commercial Bank of Mississippi, payable to the order of said Eli Abbott, who was the accommodation endorser of defendant, and endorsed by him; that said Commercial Bank afterwards transferred said notes to plaintiff in express violation of a statute law of Mississippi, entitled "an act requiring the several Banks of this State to pay specie, and for other purposes," which statute is set out in the plea; 4. The fourth plea contains substantially the same averments as the third, with the additional averment, that said Commercial Bank transferred and delivered said notes to the plaintiff in the State of Mississippi.

The plaintiff demurred to the second, third and fourth pleas, and joined issue on the first. He also replied to the third and fourth pleas, that the Commercial Bank of Columbus, in good faith, and to pay a debt due to the plaintiff by said Commercial Bank, delivered said notes to the plaintiff, of which defendant had notice; and that said defendant afterwards consented that the money specified in said notes should be paid to plaintiff under said transfer. To this replication there was a demurrer, which was overruled.

A trial was had on issue joined, which resulted in a verdict and judgment for plaintiff. The case was taken to the Supreme Court by writ of error, where the notice was held to be insufficient, for the want of an averment that the suit was instituted by the direction and authority of the trustees; and for this error, the judgment was reversed, and the cause remanded.--See 17 Ala. 754.

At the Fall term, 1850, after the cause was remanded, the plaintiff moved for leave to file a declaration; also to amend the notice, and to make proof that the proceedings were commenced by the said trustees. The court granted the motions; and the plaintiff then amended his notice by inserting these words: "By its trustees named in the certificate annexed hereto, and ap-

pointed under the act therein specified." To this action of the court the defendant excepted.

The bill of exceptions contains the following state of facts, as being agreed on by the parties on the trial: "The parties to this cause agree, that the Commercial Bank of Columbus, Mississippi, existed in that State, under and by virtue of an act of the legislature, a copy of which is filed with this case, as a part of the same; that the said State of Mississippi, in 1840, passed an act found in Hutchinson's Miss. Code, on pages 324 *et seq.*, which act, and any portion of the statute law of that State explanatory thereof, is made a part of this case; that defendant's notes described in said notice were discounted by the said Bank of Columbus, and never held by that Bank, as the legal owner and holder thereof, till 1843; that the various acts of the general assembly of this State, in relation to said Planters' and Merchants' Bank of Mobile, are to be held and taken as public acts; and that the records of the Supreme Court containing the decision reported in 12 Ala. Rep., be also a part of this cause; that after the reversal of the said cause, no further proceedings were taken in it, but the Bank continued in a course of *litigation;* that the notes specified in the notice were sold to Edward Bell and another, in December, 1850, under the act of the general assembly, and that this suit is continued for their benefit, by the consent of said trustees; that the statutes of Mississippi on the subject of interest, are to be made and held a part of this case; that Henry Goldthwaite, one of said trustees mentioned in the notice, died in 1847; that there shall be no other plea than the general issue, and that this shall be sufficient to admit all matters of defence which could arise under this agreed state of facts, if specially pleaded."

The agreement also contains the following imperfect sentence: "It is further agreed, that under the considerations, and in the manner specified in the statement of Franklin L. Owen, which statement is made a part of this case, as evidence of the facts in issue, and is annexed hereto."——. Owen states that he was employed in said Planters' and Merchants' Bank during the whole time it was in operation, and continued afterwards in the employment of its commissioners and trustees; that said Bank acted as the general agent of the Commercial Bank, from September, 1836, until the suspension of the latter Bank in 1837;

that at the time of its suspension, said Commercial Bank was largely indebted to said Planters' and Merchants' Bank; that a partial settlement was had between them on the 6th of April, 1843, and on this settlement the notes in suit were transferred to plaintiff, in part payment of the balance due from the Commercial Bank; that the Planters' and Merchants' Bank suspended in the fall of 1843, and the notes in suit, together with its other assets, were placed in the hands of commissioners, appointed by an act of the legislature, for final settlement of the Bank affairs; that, in 1845, said notes were placed in the hands of the Bank attorneys for suit; but before suit was commenced, Jemison had an interview with said commissioners, and promised to pay said notes out of his next crop, if they were withdrawn from suit; that said notes were accordingly withdrawn; but Mr. Jemison failing to comply with his promise, they were again placed, in 1846, in the hands of the Bank attorneys, and this suit was instituted; that these notes were afterwards transferred to the trustees of the stockholders, under another act of the legislature, and were afterwards sold by said trustees, at public auction, on November 30, 1850, and were purchased by Bell and others.

The defendant asked the following charges:

1. That if the jury believed from the evidence, that the plaintiff had now no property or claim of property in said notes, but that they were sold to Bell and others in December, 1850, then plaintiff was not entitled to recover;

2. That if they believed from the evidence, that the judgment of forfeiture against said Planters' and Merchants' Bank had been reversed before the amendment of the notice in this case, and that said judgment of reversal is yet in full force, then plaintiff was not entitled to recover;

3. That if they believed from the evidence, that Henry Goldthwaite died before he was made a plaintiff by the amendment of the notice, then the surviving trustees were not entitled to recover.

These several charges the court refused to give, and instructed the jury, in substance, that the act of the legislature of Mississippi of 1840, prohibiting the transfer of said notes by the Commercial Bank, was unconstitutional, and that if they believed the evidence, plaintiff was entitled to recover.

The defendant excepted to the charge given, and to each refusal to charge as requested; and he now assigns for error the several rulings of the court, above set forth, to which exception was taken.

HOPKINS & JONES, for plaintiff in error:

The opinion formerly delivered in this case, is conclusive of the questions then decided; the court will now decide such questions only as were not then determined.—1 Porter 321; 17 Ala. 770; 1 Johns. Ch. 189; 6 Wheaton 113; *ib.* 355; 10 *ib.* 446. The former opinion decides, that the Bank was incapable of maintaining this suit, as her charter had been forfeited before its commencement; that the right of action belonged only to the trustees; that the certificate annexed to the notice could be looked to for no other purpose than to see whether it stated that the property in the note belonged to the Bank, so as to give the court jurisdiction of the suit by notice and motion; and that the notice was both a writ and declaration, and might be so treated by defendant.—17 Ala. 758; 6 *ib.* 908; 14 *ib.* 676; 4 Porter 183; 6 S. & Mar. 518; 22 Wendell 610; 1 Chitty's Pleading 256. If a declaration had been filed and acted on, in a case like this, it would have been an act of supererogation, and the defendant would have had the right to treat the notice as a declaration.—4 Porter 183, 184.

The court below erred in hearing and allowing evidence to the effect that the notice was issued by the direction and authority of the trustees.—1 Peters' R. 338; 1 Story's R. 310, 312. It is less satisfactory proof than the certificate would be, which is inadmissible for any such purpose. The notice only, which is also the declaration, determines who is the plaintiff; and the court had no power to allow a change of the plaintiff, by giving the trustees permission to amend the notice by making themselves plaintiffs. This error appears, as well from the entry of the judgment allowing the amendment, as from the bill of exceptions.—3 Stewart 324; 1 Ala. 74; *ib.* 525; 3 *ib.* 154; *ib.* 660, 668; 4 *ib.* 120; 18 *ib.* 653; Governor, use &c. v. Spence, at January term, 1853; 1 Cowen 37; 22 Wend. 610; 1 Story 310; 8 Sm. & M. 53; 8 Watts & Serg. 301; Riley's Law Cases 79.

If the trustees had been made plaintiffs, pursuant to the leave

granted by the court, the demurrer to the amended notice should have been sustained. The original notice was the original declaration, and the amended notice the amended declaration. It would then have appeared from the original and amended notice, which are parts of the record, that the court had permitted a change of the party plaintiff.

But, although the court below erroneously granted leave to change the plaintiff, the attempt of the plaintiff's counsel to make the change, was a failure, and the Bank is still the plaintiff in the amended notice, as it was in the original notice. The original notified Jemison that the Bank would move against him. and by the amendment he is notified that the Bank, "by its trustees named in the certificate hereto annexed, appointed under the act therein specified," would move against him. The trustees are not named in the amended notice. The record does not disclose their names. The certificate cannot show, as has been already decided in this case, that they are the plaintiffs, and that they directed this suit to be brought.—17 Ala. 760; 18 *ib.* 653; 22 Wend. 608, 610; 1 Story's R. 310; Governor, use &c. v. Spence, at January term, 1853.

The trustees are the representatives of the defunct corporation, as an executor or administrator is the representative of his testator or intestate. If, at the date of the judgment of forfeiture, there had been a suit pending, brought by the Bank before the forfeiture, it would have abated by the Bank's loss of its capacity to maintain suits, and could have been revived on motion. or by *scire facias*, in the name of the trustees.—6 Sm. & M. 513, 529, 530; 5 Porter 231; 12 Sm. & M. 524. If a suit were brought in the name of A after his death, and the court should allow an amendment of the writ, so as to make B, the administrator of A, the plaintiff, it would be an illegal change of the plaintiff; but if B, instead of making himself by name plaintiff, should amend the writ by stating that the administrator of A, whose name appeared in the letters of administration annexed to or filed with the writ, sued, and the writ had the effect of a declaration in such a case, as the notice has in this, the letters could not be looked to, to ascertain who the plaintiff was, as they could not be a part of the record, unless they were set out on oyer. The certificate cannot be made a part of the record by a prayer of oyer, and, if it could be,

the plaintiff could not avail himself of the prayer. If the letters were a part of the record, they could not show who the plaintiff was; this could only be shown by the writ.—Governor, use &c. v. Spence, *supra*. A demurrer would surely lie to such an amended writ. The Planters' and Merchants' Bank, in whose favor only the judgment was rendered, is as exclusively the plaintiff in the last as it was in the first judgment. The Bank and Jemison are the only parties to this writ of error, as they were to the former one. They are, necessarily, the only parties to the writ, as they are the only parties to the judgment.—5 Porter 230; 6 Ala. 610.

The act of June 30, 1837, authorized the summary remedy, by motion, against such persons only as became indebted to a bank while it existed in possession of all its corporate faculties. The charter of the Planters' and Merchants' Bank was forfeited before the notes in suit were transferred; and after the forfeiture the defendant in error was not a bank.—17 Ala. 760; 14 *ib.* 676; 3 Sm. & M. 791. The remedy under the act of 1837 is confined to debtors by bills, notes &c., acquired while the Bank was in the full possession of its corporate powers, and after the passage of that act. The Bank never had any title to the notes sued upon, and therefore never acquired them. The trustees acquired the notes, if the endorsement from the payee transferred the title, as they, and not the Bank, became entitled to any right of action the endorsement may give. When the endorsement was made, the right of action against the Commercial Bank belonged to the trustees, and the transfer of the notes made Jemison indebted to them, if to any one.—8 Porter 106. In no just sense did Jemison become indebted to the defunct Bank, as the Bank never had any right of action against him. The trustees, therefore, could not truly certify that the property in the notes was in the Bank; because the Bank, while in possession of its corporate powers, never had any interest in them. The property in the notes, if the endorsement transferred it from the payee, was, with the right of action, in the trustees, who had no right to any other than a common law action.—6 Sm. & M. 513, 530; 12 *ib.* 516.

As the evidence of Owen proved that the Planters' and Merchants' Bank settled with the Commercial Bank in 1843, after the forfeiture of the charter of the former, and took the transfer

of the notes as though its charter had not been forfeited, without the action and authority of the commissioners, the endorsement was ineffectual, and did not transfer the title to the notes from the payee. The powers which the act allowed to be exercised after the forfeiture, for the purpose of settlement, were required by the act which granted them to be exercised by the commissioners. When the settlement with the Commercial Bank was made, the Planters' and Merchants' Bank, as a bank, had no more power to make a settlement, than a former president had to certify that the notes were the property of the Bank. The grant of authority to make a certificate or settlement, is in favor exclusively of the commissioners.—17 Ala. 759; Pamphlet Acts of 1843, 70, 72, §§ 2, 7.

Independently of the pleadings, the facts in the record must show affirmatively a case in which a judgment can be legally rendered on motion. The evidence in the record does not prove, as it should, that the notes which did not belong to the Bank before the forfeiture of its charter, were acquired in the settlement afterwards made by its commissioners, or by some agent of theirs authorized to make it.—8 Porter 104, 361.

The representatives of the defunct Bank had no authority to acquire the notes upon a settlement, unless the Commercial Bank was in failing circumstances at the time of transfer, and there is no evidence that such was the fact.—14 Ala. 677, 688.

Neither the Bank, nor the trustees, nor the stockholders, had any beneficial interest in the notes at the time judgment was rendered, (and therefore no right to a judgment.—12 Sm. & M. 524;) because the notes had been sold by the trustees before the rendition of the judgment. The plaintiff in the motion was permitted to recover a judgment for what belonged to others. If the property in the notes had belonged to the plaintiff in the motion at the commencement of the suit, the subsequent transfer of it before trial would as effectually have destroyed the plaintiff's right to a judgment, as the want of property at the commencement of the suit and down to the time of trial.—16 Ala. 276, 279. When it became necessary to give the court jurisdiction to try the motion and to render a judgment, by making proof by a proper certificate that the property belonged to the Bank, at that very time the property belonged to Bell and others. The sale of the notes was made under the authority of the act of February 12, 1850, and tranferred all the property

in the notes to the purchasers, Bell and others. The purchasers had no right to sue, except in chancery.—12 Sm. & M. 524; 2 Wheat. 373. The act of 1850 gives no authority to continue a suit after such a sale, and recover a judgment for the use of the purchasers, upon a certificate that the property in the notes was in the plaintiff, against the proof that the property was then in the purchasers, and the plaintiff's admission of that fact. As the act of 1850 required the sale of the notes, and the notes were sold before this judgment was rendered, that act could not have intended to continue the authority in any person to certify that the property in the notes, in such case, was in the Bank; and the passage of that act was a repeal, by implication, of so much of the former act as authorized any person to make such a certificate. The plaintiff in the motion had no right, if the charter of the Bank had not been forfeited, to bring a suit by notice for the use of another. The effect of such an allegation would be, that the property in the notes did not belong to the plaintiff, and the notice would be fatally defective. As the plaintiff had no right to commence a suit by notice and motion for the use of another, it had none to maintain such a suit after the notes were sold, and the property in them transferred to others, although the sale was made pending the suit. If the plaintiff could recover a judgment in such a case, the recovery would be without property in the plaintiff, and for the actual benefit of the purchasers. The judgment is not in favor of any party who has an interest in the notes. The Bank has no interest in them. There was no authority to make Bell and the other purchasers parties as beneficiaries; and if there had been, they were not made parties to the motion.—12 Sm. & M. 524; 3 Stew. 324; 1 Ala. 74, 76, 525; 6 Sm. & M. 527. The court, therefore, erred, in refusing to instruct the jury that, if they believed from the evidence that Bell and others had purchased and then owned the notes, the plaintiff was not entitled to recover. If the suit had been a common law action, the plaintiff had no right to recover, against the proof that no part of the interest in the note belonged to him, and his admission of that fact.—16 Ala. 276, 279.

The reversal of the judgment of forfeiture destroyed the capacity of the trustees to maintain suits, and make certificates which could give a court jurisdiction by motion founded on no-

tice.—12 Ala. 657. As they had derived all their rights, as trustees, from the judgment of forfeiture, the reversal of that judgment terminated the rights of which the forfeiture was the only source. If the Bank had been constantly guilty of *non-user* since the reversal of the judgment of forfeiture, the neglect, *per se*, is not a forfeiture, but can only become a ground of a judgment of forfeiture, in a proper judicial proceeding against the Bank.—5 Johns. Chan. R. 378; 6 Cowen's R. 23; Hopkins' Chan. 355; 8 Sm. & M. 151; Angell & Ames on Corporations 664; Kent's Commentaries 310, 311; 1 Paige 590; 4 *ib.* 481; 3 Burr. 1866; 7 Leigh 154; 14 Pick. 663; 15 *ib.* 351; 7 Conn. 45.

Although there may have been no president and directors of the Bank since the judgment of forfeiture, there have been constantly stockholders, who constitute an integral part of the corporation. They could have elected a president and directors after the reversal of the judgment, and they have a right to do so now. If the Bank, suing in its corporate name, neglect to have a president, who alone can make a certificate which will give the court jurisdiction to render judgment on motion and notice, no such suit can be maintained. The certificate made by the trustees ought to have been disregarded by the court below.—Angell & Ames on Corporations 652 *et seq.* to 660; 3 Dess. Chan. 557; 1 Hopkins' Chan. 300; 2 Kent's Com. 295, 296, 307, 309, 310, 311; 3 Burr. 1866; 1 Paige 590, 597; 4 *ib.* 481; 5 Johns. Chan. 378.

As the notes were not made, until after the passage of the act of 1840 by Mississippi, the prohibition by that act of the transfer of the notes was not a violation of the constitution of the United States.—6 Howard 335; 3 Sm. & M. 661; 8 Peters 88, 110.

John A. Campbell, *contra :*

The point upon which the judgment in this case was formerly reversed, was brought to light by the members of the court after a second argument. That point was, that it was essential to the validity of the proceedings that they should appear to have been instituted by the trustees. The form of proceeding adopted in the case, corresponds with that which had been employed during the existence of the Bank, and which had re-

ceived the sanction of the court.—6 Ala. 289. The certificate of the trustees was designed to protect courts from the abuse of the summary jurisdiction, and it stands as conclusive evidence that the proceeding, of which it forms a necessary part, was for the Bank. The cases relied on in the opinion of the court, do not support its conclusion. The case in 8 Wendell does not decide that the averment of the authority of the trustees must appear in the declaration. The court decided that, where the existence of the Bank was denied by a special plea, the receiver should show, in his replication, not only his right to the proceeds of the case, but also that he caused the suit to be instituted.—The case in 13 Ohio 251, was not upon the point. The case in 13 Ohio 298, was where a defunct corporation had recovered a judgment during its existence; after its dissolution, a law was passed, allowing receivers or trustees to revive such judgments. This was not a proceeding by the receiver or trustee, but against him. The writ was against the Bank only, not noticing the fact of the existence of any trustees. These cases, surely, are not sufficient to overturn the plain language of the acts entitling the Bank to use the same form of proceeding as if the statute of forfeiture had not been passed.—Pamphlet Acts 1843, 70 § § 7, 9; *ib.* 1845, 46 § 8; and the equally plain language of the case in 6 Ala. 289. The eighth section of the act of 1845 is so explicit in its terms, that I cannot see how a proceeding, which is perfect according to the decisions applicable to the active Bank, can be imperfect during the continuance of that act.

Granting the obligatory force of the decision, the question arises, could we, after the order remanding the case, supply the proof of the authority? The suit is proper in the name of the Bank, and according to the form adopted; could we establish it as a fact, that the motion was submitted by the authority of the trustees, and could we place that averment in the notice? Both courses were adopted, in order to obviate all objection to the form of the proceeding. It is said, that we have introduced a new party on the record, and numerous cases are cited to show that we have introduced new parties improperly. The party on the record, is the Planters' and Merchants' Bank of Mobile. The act allows that name to be used, and all the modes of proceeding at any time permitted to that party to be employed in the same manner as if the Bank had never forfeited its charter.

The Bank was continued in operation, for the purpose of settlement.—6 Ala. 289. The fact proven is, that the suit was commenced by legal authority. All is rightfully done, if done by order of the trustees; that fact is now established. The record is complete as to parties, without the addition of a new one. The court has held that the plaintiff must appear, not by attorneys, but by trustees. The trustees are introduced. Can this be done? The amendment to a replication, showing the same fact, was allowed.—8 Wendell 645, 656. The character in which a captain, suing for a military fine, received his command, was introduced by amendment.—25 Maine 164. The agent for a State prison was allowed to introduce his proper name before his official style.—1 Denio 279. The converse, the style in which persons held lands, and sued for damage to them, was allowed.—3 Greenl. 243. After a plea of infancy of the plaintiff, a guardian was allowed to be introduced.—8 Pick. 552; 3 New Hamp. 345. These cases are parallel with this. An infant cannot maintain a suit alone; the aid and direction of a guardian or next friend, is necessary, and they can be procured after suit brought. In this case, the suit was brought by the proper direction; we only ask leave to place the fact on record. The name of a legal trustee, for the use of a plaintiff who is the *cestui que* use, is allowable.—1 Har. Penn. R. 60; 2 *ib.* 69; 8 S. & W. 342; 22 Verm. 460. The principle cited by plaintiff's counsel from Riley's Cases 69, fully supports our view, "You may add to or vary the particulars set out in subsequent proceedings, where the previous proceedings are general in their times; *provided*, that in so doing, you do not go beyond the intendment of the previous proceedings. For instance; you may add to or alter the counts of a declaration, provided you keep within the general complaint set out in the writ. This is an example of amending, not by, but within the scope of the record."

Supposing the averment necessary, that the trustees directed the suit in this case, it is a fair intendment from the record that such a fact existed. The trustees are named, and perform a part essential to the case. They are in court for one purpose, and their act in one step in the cause is of record. The courts have allowed sheriffs to file their returns of service of the original writ, after error brought; and orders of publication to be

proven, with the fufilment of them.—2 Ala. 415; 2 Stew. 492. The court is referred to the last clause in section 50, Clay's Digest 321, where the plenary power of the courts to make amendments is conferred.

There are decisions to the effect that orders of amendment cannot be assigned for error, where the party has pleaded.—1 Ala. 246; 3 Peters 12, 32; 4 *ib.* 492; 9 Wheat. 375; 3 Green 183; 6 Cranch 206. By pleading, the party waived his right to complain.—1 Stew. 425; 5 Howard's S. C. R. 30. The effect of the amendment is, to perfect the proceeding from the inception; it relates to the time when it should have been made. Daniel's Ch. Pr. 455, note 1; 10 Ala. 92, 678; 14 *ib.* 279; 2 Stew. 255. The act of instituting the suit took place when the motion was made; the proof of the fact showed that the suit was properly in court. Even the certificate need not to have been made, until the trial.—6 Ala. 286. This fact could have been proved in the same manner.—1 Stew. 442. The death of Judge Goldthwaite made no change in the act. The act was done, and the only question was, by whose direction. That was matter of proof, which might be made at the trial.

The alteration in the condition of the judgment of forfeiture, did not affect this case, which was already legally in court, by the motion and certificate. The court had jurisdiction over it, in so far as the parties were concerned. Its jurisdiction was not ousted, by any matter *ex post facto* occurring to those parties.—8 Peters 1; 12 *ib.* 165; 2 *ib.* 565; 1 Barbour's S. C. R. 449; 9 Wheat. 537; 2 Brock. 516. The judgment did not affect practically the relations of the Bank. The trustees continued their operations under the liquidating laws, and the State continues to hold the franchises seized under the judgment of forfeiture. The acts of the trustees were done while the judgment was in full force, and were valid under the powers that had been conferred on them. The suit had been legally commenced, and when it became a suit in court, it was governed by common law proceedings and principles. The distinguishing characteristic of this suit from others terminated with the introduction of the case to the court; after that, it follows the same course as any other case.

The sale of the property under the act of 1850, does not alter the condition of the suit. That a paper may be assigned,

pendente lite, and the suit continued for the benefit of the assignee, is clear: it is a matter of every day's occurrence, and there are cases where the assignee would not be allowed to maintain a new suit.—2 Chitty 637; 1 Taunton 109. The cases of assignment, and the protection extended to the assignee, will be found in 1 Wheat. 233; 14 Conn. 123; 29 Maine 9; 15 Mass. 534; 1 Foster 121; 11 Mees. & W. 84; 7 Green 28. The ownership of a note cannot be inquired into, to defeat a suit.—15 Ala. 834; 17 Vermont 589; 4 Wharton 489; 25 Wendell 411; 7 Shep. 437; 15 Wendell 640. These cases are applicable to a suit at its commencement. Far stronger is the case of a transfer *pendente lite*, and where the assignor agrees to carry on the suit, as is proven in this case. A suit pending changes the character of an instrument, from a negotiable to an assignable character.

It is insisted that the act of 1850 terminates the existence of the Bank, and all its functions, as a suitor in court, and as a party on the record. This is not the case. The act was designed for the benefit of the corporation. The legislature, from the beginning, saved the rights of the stockholders, and in no instance employed its powers to impair their securities or their property. The sale contemplated was of choses in action, some in judgment, some in litigation, and some never litigated. To say that suits then pending might not be sold, with the advantage of the fact, would be to expose the Bank to the loss of a great benefit. In one of the notes in this suit, the dismissal of the suit would be to destroy the title to recovery, as Jemison could then plead the statute of limitations; and other instances of the kind might occur. A note offered in connection with an existing suit, would bring its value; without the connection, its value would be destroyed. It would be to give a character to these statutes they ought not to bear, to say that the power to maintain suits did not continue until all the rights of action had been legally settled. The stockholders were materially interested in this right, and the general assembly no where shows any purpose to withdraw it. The broad terms of the different acts all indicate that this construction would carry into effect the will of the legislature.—11 Humph. 572.

As to the effect of the statutes of Mississippi: I insist that Jemison, having agreed to pay these notes to the Bank, is es-

topped from setting up the laws of Mississippi. What are the facts? The Bank of Columbus, with unlimited powers to acquire and alienate property, and to make contracts, becomes a debtor to the Planters' and Merchants' Bank. The legislature of Mississippi, after this, forbids the Bank to alienate a portion of its property. The Bank, in defiance of the prohibition, in Alabama, appropriates a portion of its property to pay that debt. The property is alienable under our laws. The object of the transfer is meritorious by our laws. Our laws would have taken away the right of the Columbus Bank to the debt, by attachment at the suit of the plaintiff. Jemison has no defence to the notes, which are negotiable on their face; he only insists on the illegality of the transfer from the Columbus Bank to the Planters' and Merchants' Bank. Knowing of this transfer, he approves it, and promises to pay the debt to the plaintiff. He is under a moral obligation to pay it; if he had paid the money to the Columbus Bank, and that Bank had paid it to the plaintiff, no complaint could have been made. He obtains indulgence in consequence of his promise; he is estopped.—8 Term R. 595; Broom's Legal Maxims, (50 Law Library,) 310; 7 New Hamp. 549; 8 Shep. 484; 3 Ala. 158; 8 Peters 372.

Our courts would give no aid to such a statute as that of Mississippi. Property is alienable with us; it is a right inherent in every owner or proprietor. The payment of debts with property or money, is a duty imposed by our laws on every debtor. We would recognize no restrictions upon this right, nor consent to impediments to the performance of the duty.—The limitations under which one State gives effect to the laws of another, exclude this case.—Story's Conflict of Laws § § 29, 30.

The restriction upon the Bank of Columbus is plainly unconstitutional; it violates the rights contained in sections two, three and four of the charter of the Bank.—Mississippi Acts 1836, 145. This question has been fully settled by the Supreme Court of the United States, in 6 Howard 301. The principles of that case are applied to bank charters of the same kind, and to transactions of every description under these charters, in Mississippi.—10 Sm. & M. 428. A case in 11 Sm. & M 555, was one of an assignment by the Bank in 1843: see also 10 How. 190.

It is said, that the summary process will not lie for notes taken by the trustee.—14 Ala. 668; 17 *ib.* 761. The papers taken in the cases last cited, were taken under the same circumstances as this paper. These decisions, and that in 6 Ala., are to the effect, that the corporation, as an artificial person, was continued for all purposes of settlement and liquidation. The trustees were agents for those interested in the corporation. The legal interest of none of the effects was placed in them; they were commissioners, acting under delegated authority.—The indebtedness of every party to a debt belonging to the institution, was to the institution as a corporation, and never to the trustee. The power of the Bank to maintain suits has never terminated; they were continued by enactment in 1843 and 1845, and the reversal of the judgment of forfeiture gave to the Bank its former corporate existence. The Bank continued in liquidation, and the acts performed under the liquidating statutes are valid.

The case before the court is not analogous, in any of its aspects, to the case of a corporation whose charter has expired. There the party ceases to exist, and can do no legal act. The case here is that of an artificial person, which has never lost its capacity to sue, or to make contracts of a specified character. The contract, in taking these notes, selling them, and allowing the continuance of this suit, are all within the exercise of that function of the corporation for which it has been continued.—The continuance of the suit enhanced the price of the property, and there was nothing to hinder this in the condition of the Bank. The charter of the Bank is a continuing law, and there is nothing to preclude the Bank from now going into operation.

PHELAN, J.—When this case was last here, it was decided, that the notice in the case was demurrable, because it did not show that the suit was instituted in the name of the Bank by the direction and authority of the trustees, and the judgment was reversed for that cause.—17 Ala. 754.

The court below, previous to the last trial, on motion of defendant in error, permitted an amendment to be made, by which, instead of reading "the P. & M. Bank will move," &c., the notice was so changed as to read thus: "The P. & M. Bank,

by its trustees named in the certificate annexed hereto, appointed under the act therein specified, will move," &c.; the words in italics being inserted.

It is now urged by plaintiff in error, that this was allowing a change to be made in the parties to the suit, which, it is said, cannot be done under a motion to amend. No change can be made in the parties to the suit, by way of amendment of the writ or declaration, it is conceded. The authorities to this point are numerous and clear; and also, that to drop a *cestui que use*, or to insert one, is to change the parties under our law.—Teer v. Sandford, 1 Ala. 525; 1 Stewart 162.

But what are the facts, and the law of this case, to the point in question? When this suit was instituted, there was a judgment in force against the Planters' & Merchants' Bank of Mobile, declaring its corporate character defunct. There was also a public law declaring that the *trustees, or the survivor or survivors of them*, who were made so agreeably to the provisions of the law, might "use the corporate name of the said Bank, in the collection of debts due to the same," "and all the modes and powers given to the said Bank by its original charter, or by any subsequent acts of the legislature, for the collection of its debts, *in the same manner as if the charter of the Bank had never been forfeited.*—Acts of 1844–5 p. 46 § 8.

The corporate name was here authorized to be used, in the collections of the debts due the Bank, just as it had been done; but how? by whom? *By its trustees.* The corporate existence of the Bank was gone. If a notice issued, which on its face pre-supposed the continued existence of the Bank, or rather, if the continued existence of the Bank, as a corporation, was not, by some definite and certain mark or sign, distinctly negatived, the acknowledged law and fact of the case made such a notice demurrable.

The name was right, and its use fully authorized; but an additional fact was necessary to make such name and its use appear lawful; and that fact was the *agency* of the trustees in the matter. An averment setting forth this agency, would give life, *quoad hoc*, to a corporation as party plaintiff, which otherwise was defunct.

The idea that this was introducing a new party, or changing the plaintiff, is not defensible. The facts were always the same. The only difference between the first notice and the last, is, that

the last makes an existing fact appear which the first did not. Doubtless it was thought by those who instituted the proceedings, that the certificate which was appended to the original notice, and issued with it to the sheriff, did so connect itself with the notice by mere conjunction, and because it was a part of the proof in the case, as to make this fact appear. This court could not so decide, consistently with what it considered sound principles. But the trustees are not parties in any sense. They are not the nominal party. The Bank is that, in so many words. They are not beneficiaries: for the beneficiaries of all such suits are the creditors of the defunct corporation. They are only those who are designated by law as having the right to use the corporate name of a defunct corporation for certain purposes; and which name, if used without making this appear, may be treated in a legal proceeding as having no force or virtue. The amendment, then, we consider allowable, according to the liberal practice authorized and required by our statute on the subject of amendments.—Clay's Dig. 321 § 50. Or, even if it be conceded, that the certificate annexed to the original notice cannot be looked to "as any part of the record or proceedings," we are of opinion, that the amendment would be allowable upon the principle of supplying in a declaration (for a notice is both a writ and a declaration,) an averment consistent with the nature of the action, which had been omitted, and for the want of which the declaration had been held defective on demurrer. It is good, upon the principle that you may amplify a general complaint by giving any particulars within its scope.

The objection taken to the manner in which it was made, namely, by a reference to the certificate which was annexed to the notice, we do not consider good. If the trustees were even to be considered parties to the action, the certificate shows who they are, and how they became trustees, distinctly and plainly. The averment in the notice, connects this certificate, and embodies it in the notice, so to speak, by apt and proper words. The certificate is on the same paper with the notice, and the two come under the eye at a glance. The maxim "*id certum est, quod certum reddi potest,*" applies in full force. But, as has been shown, the trustees are not parties to the suit; it is only necessary to avoid the effect of a demurrer to the notice, that it should appear that the suit was instituted in

the name of the Bank *by them*, or under their direction; and this, beyond question, can be done in the way adopted by defendant in error, that is, by connecting the certificate with the notice by apt words, to show who were the trustees, and how they came to be such, that put this suit in the *name of the Bank* in motion.

But passing from this question, it is insisted, that the reversal of the judgment of forfeiture of the charter of the Bank, which took place in June, 1847, (12 Ala. 657,) had the effect, *ipso facto*, to restore the corporation to its franchises; and that this necessarily took away from the trustees the power to carry on this suit any further in this form.

The facts of the case go to prove, that, after the decision of the *quo warranto* against the Bank, its franchises were seized by the State, and powers conferred on commissioners by the act of 1843, and afterwards on trustees chosen by the stockholders under the act of 1845, to wind up and make an end of the affairs of this corporation. The very trustees who direct this suit, had to be chosen by the stockholders. Again; in 1850, a period subsequent to the reversal of the judgment of forfeiture, an act was passed for "the final settlement of the affairs of the Planters' and Merchants' Bank of Mobile;" and by this last act, these very trustees who instituted this suit, and who were chosen by the stockholders to do that and all other things necessary to wind up and settle finally the affairs of the Bank, were directed, after due notice to all persons to present their claims against the Bank by a given day, or be forever barred, to make public sale, "for cash, of all the remaining property, claims, rights and assets belonging to said Bank fund," and to make final distribution among all concerned.

The purchase by Bell and others of the Bank's interest in this claim, was made at that sale. In addition to this, it appears that the stockholders have never taken any step towards resuming their corporate powers and privileges, but have acquiesced in and acted under the law passed 12 February, 1850, for winding up finally the affairs of the corporation.—See Acts 49–50 p. 126.

If, under these circumstances, the stockholders should interpose themselves to arrest the progress of this action, they could not do it in this proceeding; and if they resorted to another forum, that forum would be bound to see that no injustice was

done to *third* persons. The action was lawfully begun, at the time it was begun. There was then a judgment of forfeiture against the Bank. Under the act of 1845, the stockholders had chosen trustees—these very trustees—to wind up and settle the affairs of the corporation; and in pursuance of that authority they instituted this suit in the name of the Bank. Being then right and lawful, and new rights and interests attaching to it, and growing up under it, the law will not permit those rights and interests to be disturbed or affected at their instance by anything occurring subsequently, which those newly interested could not be expected to foresee or provide against.

If the stockholders themselves could not interpose in this suit the reversal of the judgment of forfeitnre, it follows very clearly, that a debtor of the corporation could not do so. A judgment in this action, go as it may, will undoubtedly protect the defendant from any subsequent action, and that is all he can claim.

But it is contended, that the act of February 12, 1850, (Pamphlet Acts 126 § 2,) pursuant to which these notes, then in suit, were afterwards sold by the trustees of the Bank, was a repeal, by implication, of the former act, which authorized trustees chosen by the stockholders to use the name of the Bank, and all the modes of proceeding which the Bank, while in existence, could use, to wind up and settle its affairs. Whether a repeal of that act, (the act of 1845,) in so many words, would have the effect of destroying the right of a lawful assignee from the trustees to use the name of the Bank to sue, it is not needful now to decide; but it is certainly not clear that it would.—Repeals by implication are never favored; and if we look at the nature of the case throughout, we shall find no reason to suppose that the legislature, by the act of 1850, intended to do anything but to promote, as far as it could, the settlement and close of the affairs of this Bank, in a way the most advantageous to creditors and stockholders.

The second section of the act of 1850 simply directed, that all the "remaining property, claims, rights and assets belonging to said Bank fund," should be sold for cash, by the trustees, and the proceeds distributed. It is a general principle of law, that a note or other claim in suit may be sold and assigned; and when so sold, the assignee buys with it, if nothing is said,

the right to continue the suit in the name of the seller, he being secured, if he requires it, against the payment of costs. The buyer or assignee takes the claim *in suit*, with every right, and under every liability, which appertained to it in that condition in the hands of his assignor. This is familiar law, and every day's practice. When, therefore, the legislature said to the trustees, "Sell all the Bank's claims by a certain day," they must have intended the claims in suit as well as others. But we must further suppose, when no restrictive words are used, that they intended to leave the claims in suit to the general rule governing such sales. This was for the benefit of the stockholders, and it is the common and natural interpretration to be put upon the act. Who would buy a note in suit, if the right to continue the suit did not go with it?

But, that the Bank is the *bona fide* owner of the note in suit, must be certified by the trustees, as an indispensable fact to give jurisdiction to a suit by notice and motion; and how can this be truthfully done, it is asked, when the Bank is no longer *bona fide* owner, but when Bell and others are owners in fact? A jurisdictional fact must exist at the time to which the question of jurisdiction, if it be tried, relates; and when is that? To the commencement of the suit.

A notice issues in the name of the Bank against the defendant, which describes accurately a certain note on which he is sued. To this notice is appended a certificate of the trustees, saying, "the debt specified in the notice aforesaid, is really and *bona fide* the property of said Bank." If those signatures be genuine, that certificate, under the law, is proof of the jurisdictional fact to the end of the suit; and there is no need for any future certificates, should the note in suit be sold or assigned twenty times. Each purchaser would succeed, among other things, to the benefit of that proof, as incident to the note.—There was proof, also, that the trustees expressly stipulated that the suit might proceed as it stood.

It is insisted that, at the time these notes were transferred, it was not possible to put the legal title to them in the Bank, because it was then a defunct corporation. But the powers of the Bank for maintaining suits, and its corporate name, were expressly continued in existence by the act of 13th February, 1843, and the subsequent acts for the purposes of settlement

of the affairs of the Bank by trustees. This is the idea continually kept in view in all the acts. To hold that a transfer of a note or bill could not be made in such manner as would alone give force and effect to these provisions, would be inconsistent with the manifest intention of the act. The right to take the legal title to the Bank, by its corporate name, is necessarily implied in the power given to the trustees to bring suits by notice and motion in that name. The only question really to be determined respects the right of the trustees to take these notes at all. For, if they possessed this right at all, the right to take them, and the title to them, in that way and manner which would enable them to use the corporate name of the Bank, and the summary remedy in collecting them by suit, is clear. This was the express design of the act of 13th February, 1843, and of the act of 1845 before quoted.

Now, as to the right of the trustees to acquire these notes. This depends upon whether they were taken from a debtor in failing circumstances, or to secure a "bad or doubtful debt."—See 14 Ala. 668. The proof shows that these notes were taken by the trustees, through their agent, in settlement and part liquidation of a long standing balance which the Planters' and Merchants' Bank held against the Commercial Bank of Columbus, an institution which had suspended specie payments. This is enough to show that the trustees had the right to acquire these notes, since a balance so due from a suspended Bank cannot be considered otherwise than a bad or doubtful debt.

This brings us to the question concerning the constitutionality of the statute passed by the Mississippi Legislature, in 1840, (Hutchinson's Miss. Dig. 324 *et seq.*,) by which the Banks of that State were forbid "to transfer, by endorsement or otherwise, any note, bill receivable or other evidence of debt;" and which declared, that, "if it shall appear in evidence, upon the trial of any action upon any such note, bill receivable, or other evidence of debt, that the same was transferred, the same shall abate upon the plea of the defendant."

The facts of the case show, that the notes in suit were discounted by the Commercial Bank of Columbus, Mississippi, in 1842, and held and owned by said Bank until 6th April, 1843, when they were transferred by endorsement to the Planters' and

Merchants' Bank of Mobile, in part payment of a debt due from the former to the latter Bank.

The following extracts from the charter of the Commercial Bank of Mississippi, passed in 1836, will show the powers which were conferred on that corporation in relation to the right of selling, transferring or disposing of her property and effects. The second section of the charter (Miss. Acts of 1836, p. 146) declares, that said Bank "shall be able and capable in law to have, purchase, hold, &c. to them, their heirs, successors or *assigns*, lands, tenements, hereditaments, goods, chattels and effects, of what kind, nature, or quality so ever, &c., and the same to grant, alien, sell or dispose of at pleasure," &c. Section third gives the power to discount notes; and section four, "to deal in exchanges, foreign and domestic."

These portions of the charter of the Commercial Bank are not materially variant from the corresponding portions of the charter of the "Planters' Bank" of that State. That charter gave power to the Bank "to have, possess, &c. lands, tenements, hereditaments, goods, chattels and effects of what kind so ever, nature and quality; and the same to grant, demise, alien, or dispose of, for the good of said Bank." It also had the power "to discount notes payable and negotiable on their face at some Bank or Branch Bank, and bills of exchange."

The two charters may be treated, and indeed have been treated by the courts of Mississippi, as being equivalent in these particulars.—Columbus Bank (use, &c.) v. Thompson *et al.*, 7 Sm. & M. 443.

This being so, we are relieved from the necessity of considering the question of the constitutionality of this statute prohibiting transfers, as a new question. It has been decided, apparently with great consideration, and after labored arguments on both sides, by the Supreme Court of the United States on appeal, that the statute violates the provision of the constitution of the United States. (Art. 1, Sec. 10,) which declares that 'No State shall pass any law impairing the obligation of contracts.' The charter of the Commercial Bank is holden by that court to be a contract between the corporators and the State; and among the obligations of that contract, the obligation on the part of the State, evinced by the words which have been quoted from the charter, to allow the Bank, if she saw proper, to endorse,

assign, or transfer any notes which she had acquired in the course of her business, is held to exist.—Planters' Bank Miss. v. Sharp *et al.*, 6 Howard U. S. 301.

The Supreme Court of Mississippi, by one decision, seemed inclined to construe the statute of 1840 prohibiting transfers by Banks as only intended to prevent an assignee of a Bank from suing in his own name, and not as intended to render the note actually void after an act of transfer.—Baldwin v. Payne, 3 Sm. & M. 681.

But in a subsequent case, (Planters' Bank v. Sharp, 4 Sm. & M. 25,) the Supreme Court of Mississippi finally decided, that the act of transfer according to the statute made the note void; and that no suit could afterwards be maintained upon it, either by the assignee in his own name, or in the name of the Bank.

The Supreme Court of the United States, 6 Howard, *supra*, also hold this to be the true construction of the Mississippi statute of 1840, and, so holding, decide that it violates the obligation of the contract between the State and the Bank, and is therefore itself violative of the constitutional provision bearing on that point, and for that reason void.

We feel no hesitation in following that court on both the questions, that of construction and that respecting the consequences which follow such construction. The Supreme Court of Mississippi has since acquiesced in that construction.—Grand Gulf R. R. & B. Co. v. The State, 11 Sm. & M. 429.

It results from what has been said, that we find no error in the record, and the judgment below is affirmed.

Gibbons, J. did not sit in this case.

Ex Parte SWAN.

1. In ejectment, at common law, the death of the lessor of the plaintiff did not abate the suit, but it might be continued in the name of the nominal plaintiff, for the recovery of the land and nominal damages; and where the action for mesne profits was commenced in the name of the nominal

plaintiff, as it might be, the suit would be unaffected by the death of any party in interest on the part of the plaintiff.

2. But by our statute, (Clay's Digest 320 § 46,) a judgment for damages can only be rendered in favor of the real plaintiff, and if he dies pending the suit, a judgment for damages in favor of the nominal plaintiff is void.

3. In ejectment in this State, where damages are sought as well as the land, if the lessor of the plaintiff dies pending the suit, it must be revived in the names of his heirs at law and personal representative.

PETITION for a *mandamus* to the Circuit Court of Benton, commanding said court to vacate a certain judgment rendered at the Fall term, 1852, Hon. Thos. A. Walker presiding.

It appears from the record attached to the petition, that Eli M. Driver commenced an action of ejectment in said court, against one Alexander as tenant in possession, for the recovery of certain lands. The petitioner, William G. Swan, was permitted to defend as landlord of said Alexander, and the cause seems to have afterwards proceeded under the style and title of Doe *ex dem*. Driver v. Swan & Alexander.

At the trial of said cause, the defendants suggested the death of the lessor of the plaintiff, but the court disregarded the suggestion, and tried the cause. A verdict in favor of the plaintiff was rendered, for the land, and also for the sum of "three hundred and eighty seven dollars, damages for the detention of the same." The plaintiff then acknowledged of record that he did not claim the land, and judgment was accordingly entered in favor of the plaintiff, and against the defendants, for the damages assessed by the jury, and for costs; but no judgment was entered for the land. After the other proof in the cause was closed, the defendants introduced a witness, who testified that said Eli M. Driver, the lessor of the plaintiff, was dead, and that he had died since the commencement of the suit. This fact was admitted, but still the trial went on, and resulted as above stated. The defendant Swan then moved the court to set aside said judgment, on the ground that the real plaintiff, said Driver, had died before its rendition. His death was again admitted, but the court overruled the motion to set aside the judgment.

On these facts, the petitioner bases his application for a *mandamus* to compel said court to vacate said judgment, alleging it to be a nullity.

A. J. Walker, for the motion:

1. A refusal to set aside a void judgment may, possibly, be revised on error, where a party could be made to the writ of error; but this cannot be the case, where the adverse party is dead, and no party could be made to the writ of error. The plaintiff below being dead, the defendants are without remedy, unless *mandamus* is allowed.—Moore & Cocke v. Bell, 13 Ala. 469; Holford v. Alexander, 12 *ib.* 280; *Ex parte* Jones, 1 *ib.* 15.

2. A judgment rendered in favor of a dead man is a nullity; so, also, is a judgment in favor of a name representing no real existing person. Such a judgment must be set aside on motion. Moore v. Easley, admr., 18 Ala. 622; *Ex parte* Sanford, 5 Ala. 562; Hood & Stinnett v. Branch Bank of Mobile, 9 Ala. 835; Stewart v. Nuckles, 15 Ala. 225; Holford v. Alexander, *supra;* Moore & Cocke v. Bell, *supra;* Joseph's Admr. v. Joseph's Legatees, 5 Ala. 280; Patterson v. Officers of Mobile Circuit Court, 11 Ala. 740.

3. Even conceding that, at common law, the action of ejectment was not abated by the death of the lessor of the plaintiff, yet it is certain that no judgment could be rendered, except for the damages, which were merely nominal, and in favor of the fictitious plaintiff. The rents and profits were not recovered, at common law, by the action of ejectment, but by a subsequent suit.—Tillinghast's Adams on Ejectment 320; 1 Chitty's Pleading 220; 1 Yeates 156; 3 Har. & McH. 98.

4. Whatever may be the common law on the subject, it is clear that, under our statute, no judgment for rents and profits can be rendered, the plaintiff being dead. The statute expressly requires the jury trying the cause "to assess the damages in favor of the real plaintiff."—Clay's Digest 320 § § 43 to 46; The State *ex rel.* Nabors' Heirs, 7 Ala. 459; Jordan v. Abercrombie, 15 Ala. 580; Rowland & Heifner v. Ladiga's Heirs, 21 Ala. 9.

5. Suppose the decision on the question of title had been in favor of the defendants, the judgment could have been of no validity; no execution for costs could have been issued. It would have been, in all respects, a nullity. Can, then, a judgment be rendered in favor of a dead man, when none could have been rendered against him? No person can receipt the sheriff for

the damages, when collected. If he should collect them, there is no person who can rule him.

WHITE & PARSONS, *contra :*

No sufficient reasons are set forth in the application to authorize the granting of the motion. The plaintiff waived his right to judgment for the land, as appears by the judgment entry, and took judgment for damages and costs only. In this, it is insisted, there is no error.—Gliddon v. Doe *ex dem.* Andrews, 10 Ala. 171; Adams on Ejectment 188; People v. Bradt, 7 Johns. 539. A judgment for the lessors, instead of the nominal plaintiff, is erroneous.—Chambers v. Hundley, 3 J. J. Marsh. 98; Wharton v. Clay, 4 Bibb 167.

If, in ejectment, there be a verdict and judgment for defendant, the judgment for costs must be against the nominal plaintiff, and not against the lessor.—Doe v. Owen, 2 Black. 452; 2 U. S. Digest 153 § 808.

A writ of error can be sustained in the name of the casual ejector.—Roe v. Bank of United States, 3 Humph. 26; 2 U. S. Digest 152 § 790. The death of a sole defendant before verdict will not abate the suit.—Adams on Ejectment 298.

Where the lessor of the plaintiff dies, after judgment in ejectment, the execution may issue in the name of the lessee, without the necessity of a *scire facias.*—Penn v. Klyne, Peters' C. C. R. 446.

Where the lessor of the plaintiff dies pending the suit, judgment will be rendered as if he were still living, and possession will be given, under the control of the court.—2 Munford 453.

Mesne profits, by way of damages, may be recovered in ejectment.—Boyd v. Cowan, 4 Dallas 138; Brown v. Galloway, Peters' C. C. R. 291; Benson v. Matsdorf, 2 Johns. 169; Murphy v. Guion, 2 Hay. 145.

GIBBONS, J.—As a general rule, it is undoubtedly true that a judgment for or against a dead man is a nullity. This proposition has been so often recognized in this court, that it is not deemed necessary to cite authorities in support of it.

But, whilst this is true as a general rule, it seems to be equally true that, in the action of ejectment, at common law, the death of the lessor of the plaintiff does not abate the suit, and

the nominal plaintiff is deemed competent to continue the action, at least for the recovery of the land and nominal damages.—Adams on Ejectment 320, 335; 1 Wendell 27; Frier *et al.* v. Jackson *ex dem.* Van Allen, 8 John. 495. At common law in the action of ejectment the plaintiff only recovered the premises sued for, and damages for the ouster, which were generally nominal. "In the action of ejectment," says Mr. Chitty, "as at present conducted, though nominally a mixed action, being altogether a mere fiction, it being brought by a nominal plaintiff against a nominal defendant, for a *supposed ouster*, merely nominal damages are given; and satisfaction for the injury the real plaintiff has sustained, by being kept out of the mesne profits &c., is not in general included in the verdict in the ejectment."—1 Chitty's Plead. 193. These were the subject of a separate action, called an action for mesne profits; in form an action of trespass *vi et armis*, "but in effect to recover the rents and profits of the estate."

In remarking upon this latter action, the same author says: "The action for mesne profits may be brought by the lessor of the plaintiff in ejectment, either in his own name or in the name of the nominal lessee, (John Doe;) but in either shape, it is equally his action; for it is not in any manner affected by the fiction, which prevails in the ejectment. It is sometimes, however, more advantageous to bring the action in the name of the lessor of the plaintiff, who is the party really concerned, as he may then recover damages for the rents and profits received by the defendant previously to the time of the demise laid in the declaration in ejectment, which cannot be done at the suit of the nominal plaintiff."—1 Chitty's Pl., *supra*.

By analogy, it would seem to follow, necessarily, that when the action for mesne profits was commenced in the name of the nominal plaintiff, the suit would be unaffected by the death of any party in interest on the part of the plaintiff, as the nominal party, John Doe, never dies.

In this country, the action of ejectment is generally understood to be the proper remedy for the recovery of both the lands and mesne profits in the same suit, and the authorities in support of this position are very numerous. For all practical purposes, this enlarged view of this action has much in its favor, as it accomplishes in one action, what could otherwise be effected

only by two. Conceding to the nominal plaintiff the right at common law to recover the lands and nominal damages in the action of ejectment, notwithstanding the death of his lessor, and also the right to bring a suit in his own name for the mesne profits after the recovery in ejectment, it is difficult to perceive any reason, according to the rules of the common law, why he should not have the right to recover both the lands and mesne profits in the same action, where by the rules of practice both could be recovered in the same suit; and this, we apprehend, would be the case in those States where by the established practice the two actions were united, if they were unaffected by statutory provisions.

But however this may be in other States, our statute has placed the action of ejectment upon a basis entirely decisive of the present application. The language of the act of 1835, is, "In all cases where the action of trespass to try titles would, under the present laws, be the proper action, the plaintiff, at his election, shall have either said action of trespass to try title or the action of ejectment; and when the action of ejectment shall be brought, it shall be lawful, and shall be the duty of the jury trying the same, to assess the damages in favor of the real plaintiff, as in actions of trespass to try titles."—Clay's Digest 320 § 46. By a previous act, passed in 1821, the fictitious proceedings in the action of ejectment had been abolished, and the action of trespass to try titles substituted for it.—Clay's Digest 320 § 43. By the act of 1835, the action of ejectment is restored, but it expressly provides that it shall be the duty of the jury trying the same, to assess the damages in favor of the real plaintiff, as in actions of trespass to try titles. This act evidently contemplates the existence of a real plaintiff in court, whenever a judgment is rendered for the damages. We do not now decide that the nominal plaintiff might not have a sufficient standing in court, in case of the death of his lessor, for the recovery of the premises sued for; but, under the act, a judgment for the damages or mesne profits could only be rendered in favor of the real plaintiff. In the case before us, no judgment seems to have been rendered for the land, but one in favor of the nominal plaintiff for the damages and costs. We say in favor of the nominal plaintiff, because it is admitted of record that the actual plaintiff was dead, and therefore the only

party plaintiff in court was the nominal plaintiff. Such a judgment the court had no power to render, and it was not voidable merely, but void. Before a judgment for damages could have been rendered, parties should have been made; and this raises the question, as to who were the proper parties to be brought before the court.

In the case of the State *ex rel.* Nabor's Heirs, 7 Ala. 459, which was an action of trespass to try titles, the plaintiff having died pending the suit, it was decided that the action ought to be revived in the name of the heirs or personal representatives, according to the nature of the estate sought to be recovered. If it was the freehold that was in litigation, then the heirs were the proper parties; but, if it was a chattel interest merely that was involved in the action, then it should be revived in the name of the personal representatives. In the case of Jordan v. Abercrombie & Thompson, 15 Ala. 580, which was an action of trespass to try titles, the defendant in the suit, after the judgment in the court below, and after he had sued out a writ of error to this court, died. The question was, in whose name the writ of error should be revived. It was decided that both the heirs and personal representatives were necessary parties, in order to represent the entire interest involved in the litigation. The decision goes upon the ground, that the lands, at the death of the defendant, descended to the heirs, and they were therefore necessary parties to represent that portion of the recovery below. The damages recovered were a charge upon the assets of the deceased, in the hands of the representative, and therefore he was also a necessary party. By parity of reasoning, it would seem to follow that, where the plaintiff died pending the suit, in an action of trespass to try titles, both the heirs and personal representatives would in like manner be necessary parties; for the lands would in like manner descend to the heirs, and the damages and mesne profits, for which the defendant was liable prior to such death, would belong to the personal representative. This conclusion would be in harmony also with article 2158 of the new Code, which says: "Real actions to try the title, or for the recovery of the possession of lands, and actions for injuries to lands, survive in favor of heirs, devisees, tenants or personal representatives, and against heirs, devisees, tenants or personal representatives, ac-

cording to their respective rights; and the court must direct the record and judgment to be so framed as to secure their rights, and declare their respective interests."

We deem it important in this connection to notice our act of the legislature of 1839, which says: "It shall be lawful for administrators and executors to rent, at public outcry, the real estate of any decedent, until a final settlement of the said decedent is effected, and the proceeds shall be assets in the hands of such executors or administrators."—Clay's Digest 199 § 36. The new Code has also a similar provision. Section 1751 is as follows: "Administrators and executors may rent the lands of the deceased at public auction, and hire out the slaves of the deceased, either at public auction or by private contract, in each case securing the payment of the rent or hire by notes or bonds with two good and sufficient securities; and the proceeds thereof are assets."

The act of 1839, giving to the personal representatives the right to the possession of the lands of the decedent until the final settlement of the estate, seems to have been entirely overlooked in the case of Jordan v. Abercrombie & Thompson, *supra*. At all events, we find no notice there taken of it. If the question were now presented for the first time, since the passage of that act, as to who were the proper parties in case of the death of the plaintiff or defendant in the action of trespass to try titles, it might be urged with much plausibility that the personal representative was the only necessary party to be brought before the court, in order to revive the suit. This action of trespass to try titles was intended as a substitute for the action of ejectment, and the latter was a possessory action merely, the verdict and judgment not being conclusive as to the title, even between the parties to the record, so but that another suit could be instituted by the defeated party, immediately after the pending suit was terminated.—Camp v. Forest *et al.*, 13 Ala. 114. If, then, the personal representative has the right to the possession of the lands of his decedent until the final settlement of the estate, and the rents and profits arising therefrom during his administration are to be assets in his hands, it might be asked why he would not sufficiently represent the whole interest involved in litigation, in all cases of ejectment or trespass to try titles, where either the plaintiff or defendant dies pending

the litigation. In either action, if damages are sought to be recovered as mesne profits, and either plaintiff or defendant dies, the representative, if plaintiff, would be entitled to them, and if defendant, he would be chargeable with them. So, if possession of the land is sought by the suit, he is equally entitled to have it under the act, if plaintiff, and, if defendant, he would seem to be the proper party to yield it. This conclusion, however, necessarily involves the construction of the act of 1839 to mean that it becomes the imperative duty of the representative to take possession of the lands of the decedent, and rent them out until the final settlement of the estate; whereas we consider the proper construction of the act to be, that he may rent out the lands, or leave them to the heirs, as he thinks proper. Besides, in the action of ejectment or of trespass to try titles, the plaintiff must recover on the strength of his own title, and it would seem to be necessary to bring those parties before the court, in whom the title had vested by the death.

Our action of ejectment would seem to be compounded of the two common law actions, ejectment proper and the action for mesne profits; and that portion of it taken from the latter action is divested by our statute of the privileges which it possessed at common law, so far as it could be carried on by the fictitious plaintiff. By our statute, the jury are required to assess the damages to the *real* plaintiff in the cause. Our conclusion, therefore, is, in an action of ejectment, when damages are sought as mesne profits as well as the lands, if the lessor of the plaintiff dies pending the suit, the personal representative, as well as the heirs, is a necessary party, in order to revive the suit.—In all cases where damages are sought as mesne profits, the representative is an indispensable party. This is, in effect, adopting the same rule as that laid down in Jordan v. Abercrombie & Thompson. The only difference between the two cases is, that in that case the defendant died, whilst in the case at bar it is the lessor of the plaintiff.

The same principle, we think, governs in both cases. This rule we adopt the more readily, as it will be perceived from the article of the new Code above quoted, that the rule which we now establish is the one there laid down, and is, we are satisfied, the only one that can meet the wants and exigencies of the action of ejectment, as regulated by our statute.

The application of the petitioner must, therefore, prevail, and a rule must be issued to the Circuit Court, to set aside and vacate the aforesaid judgment, and to reinstate the cause upon the docket, so that the necessary parties may be made, if those in interest see fit further to prosecute their suit; and, on the failure of said Circuit Court to comply with said rule, to show cause why a peremptory *mandamus* should not issue.

MASON *vs.* McNEILL'S EXECUTORS.

1. Where counsel are retained by husband and wife jointly, to sue for and recover the wife's property, and a decree therefor is rendered in their joint names, if the husband dies before the execution of the decree by a delivery of the property to him, or to some person for him who holds as his bailee, the wife is entitled to it as property never reduced into the husband's possession.
2. The fact that the plaintiffs' counsel, after the rendition of the decree, permits the negroes in suit to remain with the persons to whom they were hired for the year, and does not take possession of them until after the husband's death, though he might have taken possession immediately, does not amount to constructive possession in the husband.

ERROR to the Circuit Court of Coosa.

Tried before the Hon. JOHN D. PHELAN.

DETINUE by Matilda Mason, suing by her next friend, against the executors of John McNeill, deceased, to recover certain negro slaves alleged to be in their possession, which they claim as belonging to the estate of their intestate.

The suit appears to have been a friendly one, brought to test the right to the property. The evidence is all set out in the bill of exceptions; and, as there was no conflict in the proof, that the question of title might be fairly presented, the court charged the jury that the law arising upon the facts was adverse to the plaintiff's recovery. A verdict being returned for defendants, this writ of error is prosecuted to reverse the judgment thereon rendered.

As the facts are fully set out in the opinion of the court, it is not deemed necessary to state them in this place.

N. S. Graham, for plaintiff in error:

There must be an actual possession by the husband, of the wife's chose in action, to destroy her survivorship.—Bibb v. McKinley, 9 Porter 636; Johnson v. Wren, 3 Stewart 172; Mayfield v. Clifton, *ib.* 375; Hogan v. Bell and Wife, 4 S. & P. 286; Magee v. Toland, 8 Porter 36; Dunn and Wife v. Bank of Mobile, 2 Ala. 152; 2 Hill's (S. C.) Chan. R. 504; 1 Kelly's R. 637. "Property is in possession, when a man hath both the right and also the occupation of the thing; it is in action, when a man hath not the possession, but merely a right to possess the thing."—Bibb v. McKinley, *supra;* 1 Kelly's R. 647.

When the names of both husband and wife appear in the pleadings, and where they are both necessarily used, as where the husband could not obtain a decree in his favor without the use of his wife's name in common with his own, in such cases, if the husband die after judgment, but before payment or execution, the judgment survives to the wife.—1 Dan. Ch. Pr. 150, 151; Nanney v. Martin, 1 Eq. Cas. Abr. 68; Bond v. Simmons, 3 Atk. 20; 2 Peere Williams 499; Dudley's Law and Equity R. 182; 6 Johns. Ch. R. 132; Searing v. Searing, 9 Paige 283.

The decree in the Georgia court, in favor of husband and wife jointly, does not destroy the wife's right to the property.—Bell *et al.* v. Bell, 1 Kelly's R. 645; Andrews v. Jones, 10 Ala. 423; 9 Paige 283; Hill on Trustees 415, 416, and marginal references.

It does not appear that plaintiff had notice of the proceedings in Georgia, and it is well settled that that question may be inquired into by the courts of this State.—Story's Conflict of Laws (2 ed.) 507, 508. And even if she had notice, her rights are not concluded; there is no decree *pro confesso* against her, and her husband cannot answer for her, as it does not appear that she knew of or consented to such an arrangement.—Macaulay v. Philips, 4 Vesey 17; Clancy on Husband and Wife, 443, 444, 537, 560. The later and better doctrine is, that the husband cannot bar the wife's survivorship to property capable of

immediate possession, even for valuable consideration.—1 Dan. Ch. Pr. 154; and if this be so, can he bar her survivorship by his answer in chancery?

But there is nowhere manifested any disposition or will on the part of McNeill to divest his wife of the property, or to destroy her right to it; and even if he had possession, such possession may be qualified by his intention: as between himself and his wife, ownership follows his will.—Andrews v. Jones, 10 Ala. 423; 6 Watts & Serg. 290. There is no disagreement on the part of McNeill to the right of his wife; and, until this done, the right to the judgment is in both husband and wife, and shall survive.–2 P. Wms. 496; Dudley's Law and Equity R. 183.

McNeill took no steps to enforce the decree, or to take possession. Toombs, as solicitor, was employed to represent the plaintiffs' interests in the case while pending; with the termination of the suit, his duties ended. Besides, he expressly says, that he agreed with the administratrix to let the negroes remain with those who had hired them for the year 1843; he also says, that he obeyed McNeill's instructions, when any were given. Indeed, the testimony of Toombs negatives the idea that McNeill had possession of the property, or assumed any control over it, for it must be remenbered that Toombs was also the solicitor of the administratrix.

The effect of the decree cannot be regarded as having passed the property from the wife to the husband, even waiving the question of notice, first, because that was not the object of the bill; secondly, because the decree cannot go beyond the case made by the parties or the pleadings; thirdly, because the husband can have no greater interest in the property while in court, than he had before; fourthly, because the decree simply finds and declares the rights existing by antecedent title.—Clancy on Husband and Wife, 119, 120; 10 Vesey 474, 578; 1 Kelly's R. 637; 4 Vesey 17; 1 Jac. & W. 456.

The cases of Pitts v. Curtis, and Machen v. Machen, are not applicable to this case. Each of those cases involves rather the inquiry of vested or contingent remainders. Besides, the assent of the legal representative to the delivery of the property, in those cases, is not the case at bar, for here the negroes did not belong to the estate represented by Ann Arnett; it is not a case of distribution.

The cases of Forbes v. Phipps, 1 Eden 502, and Heygate v. Annesley, 3 Brown's C. C., are now held good authority.—See note (a) to the latter case.

L. E. Parsons and John White, *contra:*

The bill filed in Georgia, to which McNeill and his wife were made defendants, charges that McNeill claims the property; the answer of McNeill and wife admits that he does claim it, and he asserts his right to it. McNeill died in the fall of 1843, after the rendition of the decree in favor of him and his wife. The testimony of Toombs shows that he regarded the property as in his possession and control from the date of the decree, and that he could have taken it into his possession at once, there being no objection; "nobody offered any opposition to it;" further, "he agreed with the administratrix to permit the negroes to remain where they were hired during the year 1843, because he feared, if he took them at once, he should be embarrassed in collecting hire for any portion of the year." It is insisted, that these facts are sufficient to show that the property was not adversely held by any one at the time McNeill died; in fact, that the property must be regarded as in the possession of McNeill's agent and attorney; at the end of the year Toombs collected the hire. Can it be possible that the possession was not changed in fact? The following authorities are relied on.—Pitts v. Curtis, 4 Ala. 350; Heygate v. Annsley, 3 Brown's Ch. R. 361; Forbes v. Phipps, 1 Eden's R. 502; Macqueen on Husband and Wife, (39 Law Library) top pages 28, 44, 45, 46, 47, 48; Magee v. Toland, 8 Porter 36; 3 Litt. 275; Clancy on Husband and Wife 116.

The case of Searing v. Searing, 9 Paige 283, will be found, on an examination of the facts, to be in conflict with the decision of this court in Machen v. Machen, 15 Ala., in which it is said, "where personal property is bequeathed to a married woman, it only requires the assent of the executor to vest the title absolutely in the husband; it is not necessary that it should be reduced to actual possession."

Toombs, as the agent of McNeill, had authority to exercise a sound discretion in the management of the slaves, after the rendition of the decree; and having decided to let them remain where they were until the end of the year, this act must be re-

garded as having been done by McNeill in person.—Kimball v. Berry, 15 Vermont R. 421; Hopkins v. Willard, 14 *ib.* 478; Porter v. Viner, Chitty 613; Gorham v. Gale, 7 Cowen 744; Leach v. Williams, 8 Ala. 759.

CHILTON, C. J.—Matilda Mason was the widow of the late John McNeill, who died in Coosa County, in this State, in the fall of 1843, and was the daughter and only heir of Silas Catchings, deceased. Silas was the son of Benjamin Catchings, who died in the State of Georgia in 1798, leaving seven children, and a widow, Mildred; the latter administered upon his estate, and subsequently married one Carlton. Mildred having sold all the property of her intestate, and purchased it in, died in 1840, being possessed of all the property so purchased, together with what is called in that State "her widow's thirds," at the time of her decease.

Ann Arnett, the sister of Silas Catchings, having been appointed administratrix *de bonis non* of the estate of her father, Benjamin Catchings, upon the death of her mother Mildred, and also administratrix of the estate of Mildred, supposing the property to belong to her father, returned an inventory of it as of his estate; but a claim having been set up by said McNeill in right of his wife, the present plaintiff, to certain lands and the slaves now in controversy, by virtue of a contract entered into between Mildred and Silas Catchings, and being notified by the heirs of both Mildred and Benjamin to resist said claim on the ground of alleged unsoundness of mind on the part of Mildred when she entered into the contract, she filed a bill on the chancery side of the Superior Court of Wilkes County, in the State of Georgia, for the purpose of having the title to the property settled, and for the direction of the court in the matter of her administration, so as to protect her against the conflicting claims, and also against the consequences of her mistake in her inventory. The bill prays that McNeill and wife, Matilda, and the heirs of Benjamin Catchings and Mildred Carlton, be made parties defendants.

McNeill and wife residing in this State, so that they could not be reached by the process of the court, publication was ordered for them, with other non-resident defendants, to appear and answer, &c. In July, 1842, it appears another order was

made, reciting that publication had been duly made, as required by the previous order, and requiring the defendants to answer in four months next thereafter; but it does not appear that the bill was taken as confessed against any one.

John McNeill answered the bill, setting forth his marriage with Matilda, the present plaintiff, that she was the only child and heir of Silas Catchings, and claims in her right the share of the property belonging to her as the representative of Silas, her father; also, claims the negroes now in controversy by virtue of a bill of sale made by Mildred Carlton and her then husband, Spencer Carlton, to his said wife Matilda, dated the 1st January, 1822, purporting to convey the slaves to her in consideration of eight hundred dollars, and prays that they be decreed to him.

A special jury came, and found "that complainant should deliver over to John McNeill, the negroes, &c.," being the same now in suit. The decree, which is without date, is, that "the complainant (Ann Arnett) do deliver up to defendant, *John McNeill and his wife*, the negroes, &c."

The deposition of Robert Toombs, who filed the bill, as also the answer of McNeill, and signed the decree as solicitor for complainant, was taken on the part of the plaintiff; and he testifies that he "was employed by Col. McNeill in his life-time to represent his interest and that of his wife in a chancery suit then about to be brought in Wilkes Superior Court, in the name of Ann Arnett, adm'r of Mildred Carlton, against John McNeil and his wife Matilda and others," and he refers to the bill and pleadings to show the nature of their interest.

He also testifies that the decree was rendered at the February term, 1843, of said court, and adds, "I considered myself, as the attorney of McNeill and wife, entitled to the possession of the negroes at the time of its rendition. I merely postponed receiving them, because they had been hired for the year 1843, and I should have been embarrassed in collecting hire for any portion of the time, if I had taken them from the persons to whom they had been hired; but I considered my right to do so complete and perfect. I received them (naming the negroes) about the 1st of January, 1844. My books show my entry of them the third day of that month." On the same day he received in cash $605 17; says he knows of no reason for the delay in receiving the negroes, except the interest and conveni-

ence of Col. McNeill; that he had no authority in writing from McNeill, and received the negroes as attorney and solicitor for his clients. In the cross examination, the witness states that he "agreed with the administratrix to permit the negroes to remain where they were hired during the year 1843, for the reasons above stated, but he could have taken possession if he had thought proper; no body offered any opposition to it."

The plaintiff having proved that she was the wife of said McNeill when the proceedings above stated were had in Georgia, that the defendants were in possession of said slaves, and their value, and the defendants offering no proof, the court charged the jury, "that if they believed all the testimony, they must find for the defendants." The jury accordingly so found, and the only question is, whether the proof shows such a possession in John McNeill of the slaves as vested the property in him, or do they go to the wife as property not reduced to the possession of the husband.

Mr. Toombs proves that he was attorney for both McNeill and *his wife;* and this may well be so, although she may never have said or written a word to him in regard to the retainer; for, although a married woman cannot in such cases make an attorney, yet, when sued with her husband, he makes the attorney for her.—Wigg v. Rook & Wife, 6 Mod. Rep. 86; Clarke v. Norris & Wife, 1 H. Bla. 235; 1 Salk. 115; 2 Strange 1272; 1 Bacon's Abr. by Bouvier 485; Story on Agency, p. 6 and cases cited in n. 1, (2d ed.)

Concede that, by virtue of his retainer as solicitor in chancery, he had the power to take the slaves into his possession, yet he did not do so until some months after the death of McNeill, and when the authority to do so, as to McNeill, was terminated by his death. He must, therefore, either have taken possession of them by virtue of authority of the plaintiff in this action through her husband, and which there is no evidence she revoked after her husband's death, or without authority. True, the witness states that, when he received them, he did not remember whether he had heard of McNeill's death; but this cannot, in the least, affect the legal proposition, that the death of the principal operated a revocation of the power.

The proof does not show that McNeill authorized the agreement which was made with the administratrix, to permit the

slaves, which were ordered to be delivered to McNeill and wife by her, to remain hired out until the end of the year. Doubtless it was a responsibility which Mr. Toombs was willing to take, as it would be better for the parties not to have an immediate execution of the decree under the circumstances; so that this cannot be construed into an exercise of dominion or authority over the property by McNeill; but conceding that the arrangement was made by his authority, it does not amount to any thing more than the postponement of the execution of the decree until after the hiring expired. The slaves remained precisely as they were when they were hired by the administratrix, and there was no consent shown on the part of those in possession that for the remainder of the year they should hold as the bailees of McNeill instead of Mrs. Arnett, or that they should deliver the slaves to McNeill or his agent, instead of the person from whom they had hired them, at the expiration of the term. We cannot perceive, therefore, how the slaves, being in the actual possession of the persons hiring them, who held them under Mrs. Arnett, could be considered as in the constructive possession of Col. McNeill; and as the possession taken by Mr. Toombs could not enure to the benefit of Col. McNeill, who had previously died, it follows that, unless the decree vests the property in him, McNeill had not at the time of his death such interest as would defeat the wife's right by survivorship.

What is the legal effect of this decree, which orders that "the complainant do deliver up to the defendant, John McNeill and his wife Matilda, the negroes, &c.?"

It will be observed that the decree is to them jointly, and not to the husband alone.

It would seem, upon principle, that to comply with the decree, the delivery must be made to both husband and wife, if living, but, if either be dead when it was made, then to the survivor; for, if it be true that the decree vests the property absolutely in the husband, the act of the court in decreeing it to be delivered to the wife as well as to him, would be unmeaning and useless.

The cases, however, upon this point are not at all consistent.

The first case which I have been enabled to find is that of Nanney v. Martin, 1 Ch. Ca. 27, (S. C. 2 Freem. 72,) which was decided so early as 1663, in which it was held, "If baron and *feme* have a decree for money in right of the wife, and the

husband dies, she shall have the benefit of the decree.

In Packer v. Windham, Prec. in Ch. 412, 415, it was insisted in the argument that, if the husband brought debt on the wife's bond, and recovered judgment, that altered the nature of the security, and made it the husband's; that by the recovery of the judgment, the debt was turned into *rem adjudicatam*, and could not therefore be a chose in action. But Lord Chancellor Macclesfield seemed to be of a different opinion, so far as the wife's right of survivorship was concerned, and thought that such judgment would not have defeated her right. Lord Cowper, C. J., however, held that, when the money was paid into court, it belonged to the husband, notwithstanding the court had power over it to retain the possession until the husband should make a provision for the wife.

In Bond v. Simmons, 3 Atk. 21, Lord Hardwicke said:—"Suppose, at law, a husband had recovered a judgment for a debt to the wife, and had died before execution, the wife would have been entitled, and not the husband's executor." Some twelve years after this decision, however, in the case of Garforth v. Bradley, this learned Chancellor held a different doctrine as to choses in action accruing to the wife during coverture; as to those, he said, the husband may disagree to the interest of the wife, and that being entitled to sue in his own name, a recovery in that form was equal to reducing into possession.—2 Ves. Sr. 676.

Afterwards, in 1790, the case of Heygate v. Annesley, 3 Bro. Ch. Rep. 362, was decided, in which a sum of money was ordered *to be paid to the husband* in right of his wife; the husband died before payment; it was held, that the right to the money vested in the husband, and it was ordered to be paid to his executor.

Eight years afterwards, in 1798, the case of Macaulay v. Phillips, 4 Ves. Jr. 15, was decided, which was a bill by husband and wife to have an account, and decree to the husband of the residue of the personal estate of a testator bequeathed to the wife, against the administrator *cum test. annexo*. Certain Bank consolidated three per cent. annuities being disclosed as the residue, amounting to £3000, standing in the administrator's name, the court decreed that the same be transferred to the Accountant General, and ordered the cause to stand over for a reference, and

proposals for a settlement on the part of the husband, to be laid before the master, &c. The husband and wife, living separate, but without legal sanction, agreed, out of court, to a partition of the fund, by which he was to take part and give up the rest. The husband died, and the wife claimed the entire fund, which was resisted by the husband's executor. The cases of Bond v. Simmons, Packer v. Windham, Heygate v. Annesley, and others, were cited. The Master of the Rolls said, "It was insisted that the payment of the funds into court made it absolutely the husband's, and a *dictum* for that is found in one case that was cited, but he could not agree to that, though it had not been, as it has been, contradicted;" he held, that the payment into court made no alteration in the right and property of the parties; that the agreement between the husband and wife did not bind her, and that she was entitled, having survived her husband, to the whole of the fund.

Mr. Eden, in his note to Heygate v. Annesley, 3 Bro. Ch. R. 362, thinks the decision of Lord Northington in Forbes v. Phillips, 1 Eden's Cas. L. Nor. 502, and the determination of Lord Jeffries in Oglander v. Baston, which hold that the decree in the name of the husband alone vests the property, so shaken by the opinions of Lords Cowper and Hardwicke in Packer v. Windham and Bond v. Simmons, *supra*, as to be of extremely doubtful authority. He, however, inclines to the opinion that a decree in chancery, ordering payment to be made, and fixing the rights of the parties, and not reserving control of the funds for the purpose of a settlement by way of provision for the wife, would change the property, as he says "The whole transaction is completed, in which respect it differs from a judgment at law, where an ulterior step must be taken by the party recovering, to make it operate against the thing recovered, viz., the suing out a writ of execution."

It is needless, however, to pursue this doctrine through the numerous decisions which have been made upon it by the English courts, since their number would tend rather to confuse than to elucidate the subject. Chancellor Kent, in a very able opinion, in the case of Schuyler v. Hoyle and Wife, 5 Johns. Ch. Rep. 196, has referred to most of them, and he thinks the rule may be considered settled, that if the husband sues alone and recovers a judgment, decree, order, &c., the property vests in

him by the recovery, and is so changed as to take away the wife's right of survivorship; but if the suit was in their joint names, the wife, as survivor, should take the benefit of the recovery.—*Ib.* 210. In the case above cited, the husband and wife jointly empowered an agent to receive certain property belonging to the wife, and pay it over to them, in connection with others. The agent received the property, but before payment the husband died. Chancellor Kent said, "The power was executed by the husband and wife *jointly*, and the direction to pay over was a direction to pay to them *jointly* the share of the wife;" and he contends that this does not show that the husband intended to appropriate the property exclusively to himself, so as to cut off the wife's right of survivorship. True, in that case, the agent was empowered to administer as well as to distribute and pay them their shares, but the administration does not change the principle. He was but carrying out the powers conferred upon him while administering, and, as to the parties who gave him the power, was agent, although he acted under authority of law as administrator.

That case, we think, is a correct exposition of the law, and, in its essential features, is not unlike the case before us. Mr. Toombs was the attorney of both husband and wife, to recover this property. He obtained a decree in favor of both, that the property be delivered not to the husband, but to the *husband and wife*. The decree does not in any way alter the title, but expressly leaves it as it was, in husband and wife; now this being the condition of the property as to title, and the possession remaining precisely as it was before the decree, and the husband having done nothing to change the character either of the title or possession, down to the period of his death, we are unable to perceive upon what principle we could hold that he had reduced the property into his possession as husband, so as to vest in him the exclusive right. If Mr. Toombs had actually taken possession before the death of Col. McNeill, as he would then have held as the attorney for both husband and wife, according to his testimony, it would seem to result from the case last above cited from 5 Johns. Ch. R. that it would not have defeated the wife's right by survivorship; but it is not necessary in this case to go to that extent, for here, as we have said, the attorney did not get the slaves into his possession until several months after the death of the husband.

Confining our decision to the facts of the case before us, we feel constrained, both upon principle and the authority of adjudged cases, to hold that where there is a joint retainer by husband and wife of counsel, to recover the wife's property, and a decree for it in their joint names, if the husband dies before the execution of the decree by the delivery of the property to him or to some person for him who holds as his bailee, the wife is entitled to it as property never reduced into the husband's possession.

The case of Nash v. Nash, 2 Mad. Rep. 133, is a strong authority to show that the arrangement made between Mr. Toombs and the administratrix, Mrs. Arnett, even if the agreement had been made by the express direction of Col. McNeill, would not have the effect of vesting the property exclusively in him. In that case, a father gave to his daughter, a married woman, a check upon his bankers for £10,000; she had presented it, and taken a note for the same payable to herself, which she afterwards delivered to her husband, and who received £1,000 of the principal, and the interest as it accrued, but died before he received the remaining £9,000. It was held, that the remainder survived to the wife.—See also Cro. Eliz. 61; Cro. Car. 77.

In Searing *et al.* v. Searing, 9 Paige 283, it was held, that where debts are due to the wife at the time of her marriage, they belong to her, in case she survive her husband, although he may have brought a suit for such debts in their joint names, and recovered a judgment therefor, if the money had not been actually collected by him in his life-time.—See also Vaughn v. Wilson, 4 Hen. & Munf. Rep. 453; Clifton v. Exr's of Haige, 4 Dess. Rep. 330.

In regard to our own decisions bearing directly or more remotely upon the main point in this case, we regret to find that, as in the English cases, there is not that harmony which is so desirable upon a question of such importance, and one which so frequently arises. We have looked into them with an anxious wish to reconcile them if we could, and at the hazard of prolonging this opinion beyond what may be desired, we deem it proper briefly to collate them, in order the better to ascertain their bearing upon the case before us.

The first decision in this State which involves the doctrine un-

der discussion, is that of Johnson, adm'r of Ramsey, v. Wren' delivered in 1830, 3 Stew. Rep. 172. That was an action of trover by the administrator of the deceased husband, to recover from the second husband of the widow (Wren) damages for the conversion of slaves alleged to have come to the first husband's possession upon his marriage, as the personal property in possession of his wife. The facts were: James Wardlaw, in 1809, conveyed the slaves, for a valuable consideration, to his sister Jane, who was residing with him as his house-keeper; she hired them to James for ten years; before the expiration of the time, and while Jane was controlling the slaves as house-keeper for her said brother, and in his absence from home, she married Ramsey, his overseer; in a few days afterwards Ramsey died, leaving the slaves as he found them. The widow afterwards married Wren, and brought to him the possession of the slaves, and they removed from South Carolina to Alabama. The question was, whether these facts showed that the plaintiff was entitled to recover. The court held, upon the authority of Wallace *et ux.* v. Taliaferro *et ux.*, 2 Call 437, Schuyler v. Hoyle, *supra*, and the doctrine as laid down by Judges Reeves and Kent, (Reeves' Dom. Rel. Ch. 1; 2 Kent's Com. 115–6,) that he was not; that the first husband "never had the actual or potential possession of the slaves," and consequently no right was transferred to his personal representative to sue for them.

The next year (1831,) the case of Mayfield v. Clifton (2 Stew. 375) came up, in which the facts were: One Thomas Murphy died, leaving a widow and two children, for one of which Mayfield was appointed guardian. The widow administered, and married Clifton, the defendant, and before any settlement of the administration, or distribution of the property of Murphy's estate, she died. Mayfield, the guardian, filed his petition for his ward's share of the estate, and the question was, whether he should have one third or one half of the estate—in other words, whether the third to which Murphy's widow was entitled belonged to Clifton, her second husband. The court held that he had not reduced the property into possession, *as husband*, and that holding it as administrator in right of his wife gave him no title to it after her death; citing the previous case, also 12 Ves. Jr. 497, in which the husband held the wife's property as executor and trustee under a will, making her residuary legatee,

and had disposed of some of it as his own, but the remainder was, notwithstanding such disposition, held to be the wife's after his death; and relying upon Clancy's Rights of Mar. W. p. p. 8, 9, as to the right of survivorship deducible from the parties who may or must unite in the action.

The case of Hogan v. Bell *et al.*, in 1833, 4 S. & Porter 286, affirms the doctrine of the two previous cases, holding "that it is not sufficient that the husband should have held as guardian, executor, or other trustee or agent, but he must have possessed the property, *quasi husband*, for himself and wife." It appeared, however, that pending the coverture, the wife being entitled under a will loaning the slaves to her for life, remainder to the heirs of her body which she might leave, and in case she should leave none such, over to her four brothers and sisters, two of these brothers had released their remainder to the wife, and another had died; the wife then died without issue, and it was held that the husband, having held the actual possession under claim of title in right of his wife, was entitled to these interests thus accruing during coverture. It was said "there was no means by which the husband could change the nature of his possession," &c.

Thus stood the decisions until 1839, when the case of Magee v. Toland came up, all the judges who presided in the last mentioned case having gone off the bench. The facts were: On the 1st January, 1835, the slave in controversy was delivered to Magee on a bailment for hire for one year by Hays, as the guardian of Miss Jane Carnathan. In June of that year, Jane married Toland, the plaintiff, and died in August following without issue, Toland never having possession, but Magee holding under the contract of hire. and not otherwise. The question was, whether Magee's possession enured to the benefit of Toland, so as to vest in him the right, as husband, to the exclusion of the wife's next kin, or, in other words, whether the marriage operated upon property thus situated so as to vest it exclusively in the husband. It was held that the possession of the bailee of the guardian was the possession of the ward, and upon her marriage is *eo instanti* transferred to the husband; and the possession, in point of law, is as much his, as it could afterwards be by actual manucaption. The court does not expressly overrule Johnson v. Wren, but draws the distinction between the two

cases, viz., that in the case cited the wife was the survivor, while in Magee v. Toland the husband survived; and it was said that Mayfield v. Clifton was not opposed to the view then taken by the court, because it was decided on the conflicting claims of a husband and the children of the deceased wife, as to her undivided distributive share in a former husband's estate.

Now, I submit, with all respect for the distinguished learning of the judges who delivered the opinion in Magee v. Toland, whether the *principle upon which that case is made to turn*, namely, *that the possession of Magee not being adverse*, the slave was not a chose in action in his hands, and so the husband's right attached, and was complete by virtue of the marriage, does not directly impinge the doctrine as asserted by the two cases in 3 Stewart. In neither of these cases was the holding adverse, or the property a chose in action, as defined by the court in Magee v. Toland; and if the effect of the marriage, without more, is to operate a complete and absolute investiture of title in the husband, in all cases where the property is not held adversely, it would seem to follow that the two former cases above referred to were incorrectly decided.

In Bibb v. McKinley *et al.*, 9 Por. 636, the earlier cases were cited with approval, and it was said that property was in possession when a man had both the right and the occupation, but in action when a man had not the possession but the right to possess the thing. In that case, the property sought to be recovered was bequeathed to the wife, with her two brothers, to be equally divided between them by the executors, who were appointed testamentary guardians, and who had taken receipts as guardians, but had acted merely under the will, and the disbursements made had been credited to them in their settlement as executors. The wife died before the property was divided, and while it was in the hands of the executors. Held, that it did not go to the husband. The case of Magee v. Toland was considered as having settled that the possession of the guardian was the possession of the ward, but the possession of the executor was not to be considered the possession of the legatee.

The next case immediately bearing upon the point is that of Pitts v. Curtis, 4 Ala. Rep. 350; in which it was decided, that a bequest of a slave to the testator's son, until the slave arrived at the age of 21 years, and the remainder to a married daugh-

ter, vested such an interest in the husband of the daughter, as entitled him to the slave upon the assent of the executor, although the wife died before the termination of the particular estate.

The court say: "It is of no moment that the actual occupancy, or right to the present possession for an ascertained period, was in another. That is nothing more than exists in every bailment; and no principle is better ascertained than that the possession of the bailee is the possession of the bailor. The rule of law is, that the general property in a chattel draws to it the possession." And it was considered, that as the special property in the plaintiff was consistent with, so it was the possession of the tenant in remainder, who had a general property in the slave. Now, we apprehend, this decision was entirely correct, but it would be difficult to sustain it upon the doctrine on which it is rested by the court. The gift of the vested remainder *was to a married woman*, and it only required the assent of the executor to perfect the husband's title. In such cases, it is not necessary for the husband to reduce it to possession; for it vests by operation of the bequest and the executor's assent, and the death of the wife does not divest the title out of the husband.—Machen v. Machen, 15 Ala. Rep. 377. But even in such case, if the husband does not reduce the property into possession, and takes no step towards its appropriation or disposition before his death, the wife takes it as survivor.—See Banks v. Marksberry, 3 Litt. Rep. 281; 4 *ib.* 356; Wilkinson v. Perrin, 7 Mon. 216; Comyn's Digest Tit. Baron and Feme E. 3, F. 1; Berry v. McAllister's Exrs., Cam. & Nor. Rep. 100. The law does not favor constructive possession so as to defeat the wife's right by survivorship; and if, in the case of Pitts v. Curtis, the husband, instead of the wife, had died, we think the authorities clearly show that she, and not his administrator, would have been entitled.—Turner v. Davis, 1 B. Mon. 152; Brashford v. Buckingham & Wife, Cro. Jac. 77; S. C. *ib.* 205; Wallace *et al.* v. Taliafero *et al.*, *supra;* Upshaw v. Upshaw, 2 Hen. & Munf. 381; Thomas v. Kennedy, 4 B. Mon. 236; Greer's Heirs v. Boone, 5 *ib.* 556; King *et al.* v. Baldrige, 7 *ib.* 535.—See also Smith v. Scudder, 11 Serg. & Rawle 325; Bohn v. Headly, 7 Har. & John. 257; Dade v. Alexander, 1 Wash. 30; Gregory v. Marks, 1 Ran-

dolph 555; 2 Bacon's Abr. (Bouvier's Ed.) 23; Whitaker v. Whitaker, 1 Dev. 310; *ib.* 456; Blount v. Bestland, 5 Ves. Jr. 515; 9 *ib.* 174; 4 *ib.* 751; Hernsley v. Lee, 2 Madd. 16, re-examined and affirmed; see 1 Roper's Husband and Wife, 238, and appendix to vol. 2nd. We notice the case of Pitts v. Curtis more particularly, because the dictum of the learned judge, which declares that, "upon the death of the husband before his wife, the property would have gone to his representatives," may mislead, as we think it is opposed to the current of authorities applicable to such cases, and is certainly in opposition to the leading case in this State, namely Johnson v Wren, 3 Stew.

The case of Woodly v. Findley *et al.*, 9 Ala. Rep. 720–1, shows, that when the wife's chose in action accrues during the coverture, the husband may exercise an election whether or not he will join his wife with him in an action to recover it. And in Andrews & Bros. v. Jones, 10 Ala. Rep. 442, it was said, if the suit be brought in their joint names, and the husband and wife recover judgment accordingly, for a debt due to the latter before marriage, and the husband dies before it is collected, the right survives to the wife; citing 9 Paige 200, and 2 Bail. Rep. 477. Mr. Roper (vol. 1 p. 216,) says: "Decrees so far resemble judgments at law in this respect, that until the money be ordered to be paid, or declared to belong *to the husband*, the wife's right will remain undisturbed; and as a joint judgment will survive to the wife, if her husband die before execution is awarded, so will a joint decree, until an order be obtained for payment, or declaring the money to belong *to the husband*."

In Terrell *et al.* v. Greene *et al.*, 11 Ala. Rep. 207, a deed was made of slaves to a husband, in trust for his wife and children; the husband took possession, and died; but as he held as trustee, and not as husband, it was considered his marital rights never attached. The case of McDaniel v. Whitman, 16 Ala. Rep. 343, and which is based upon the decision in Magee v. Toland, *supra*, holds, that money in the hands of a guardian, belonging to a female ward who marries and dies, belongs to the surviving husband, upon the doctrine that the possession of the guardian is the possession of the ward, and her possession is that of her husband; so his marital right attached, and his title was not defeated by her death. Nevertheless, had the husband died before the wife, it

is said, the demand would have survived to her, and that he cannot recover a judgment for it upon a settlement in the Orphans Court, while she is living, in his own name, but only in the name of himself and wife.—Crenshaw, guardian &c., v. Hardy, 3 Ala. Rep. 653; Hudson, guar., v. Parker, 9 *ib.* 413.

The case of Chambers *et al.* v. Perry, 17 Ala. Rep. 729, 730, is a greater extension of the principle asserted by Magee v. Toland, than was made in McDaniel v. Whitman, *supra.* In this case also, the husband was the survivor, and the wife had property, in which three others were jointly interested, in the hands of her guardian, appointed by a decree of the Chancery Court, and which decree provided that the female ward and her husband, should she marry before she arrived at the age of 21 years, might apply to the register of said court to have distribution made, who should appoint five discreet freeholders, to make the allotment. His application was made, and the commissioners were appointed, who proceeded to designate the slaves designed for the applicants, but before the confirmation of their report, the wife died. Held, that the husband's right to the property was complete, the possession of the guardian being the possession of the ward. But we apprehend that it could not successfully be maintained, that, had the *wife* survived, the action which she and her husband had taken with reference to the property would have defeated her right. If so, the cases of Crenshaw v. Hardy and Hudson v. Parker were incorrectly ruled.

The same doctrine of constructive possession again came up in Hopper, adm'r, v. McWhorter, 18 Ala. Rep. 229, in which there was a gift of slaves to four infant children to be equally divided between them, and the slaves were left by the donor with the mother of the children, who retained them for 15 years, and then made a division by the consent of the donees. Before the division, one of the children married, and her husband had died, and she had married a second husband, who received his wife's share of the negroes, to recover which this suit was brought by the first husband's administrator. It was held that the first husband's right was complete, and his administrator entitled. This decision goes beyond any which this court had made in depriving the wife of her right to property, over which the husband had exercised no control or dominion, and which he had never had in actual possession, or claimed in any way, so far as the

proof disclosed. Although it received my sanction, more mature reflection and thorough investigation have satisfied me that it was incorrectly decided.

It will be manifest from this examination of our own decisions, that none of them, when applied to the facts of the case before us, sustains the claim of the husband's executors. The slaves were choses in action; the title to them was in dispute, and a suit was necessary to settle the conflicting rights of the parties. This suit was brought, and a decree rendered in favor of husband and wife, but the subject matter of the recovery had not been reduced to possession. Suppose the administratrix, Mrs. Arnett, finding that Col. McNeill was dead, and that there was a conflict between his widow and executors, as to which of them should take the property, had filed her petition in the cause, setting forth these facts, is it not very clear that the court of equity in Georgia would have given the property to the surviving wife? We think it quite clear from the principles asserted by the Supreme Court of that State in Bell *et al.* v. Bell, 1 Kelly's Rep. 637, that it would. We apprehend, also, that while the decree remained unexecuted, and the property in the hands of the bailees either of Mrs. Arnett, or the court, the wife, upon an application in the nature of review, might have asserted her equity. This only serves to show that the husband's right was not absolute, and that the wife's interest was not divested by the operation of the decree, as the court still retained the power over the cause to direct that the decree should be executed in favor of the surviving wife.

It results from what we have said, that the charge of the court was erroneous; the judgment must, therefore, be reversed, and the cause remanded.

ANDREWS ET AL. *vs.* HOBSON'S ADM'R ET AL.

1. When the defendant in error, who was also defendant below, assigns no cross errors on the record, he cannot be heard to question the action of the Chancellor in overruling his demurrer to the bill.
2. Where a debtor conveys by deed all his property, both real and personal,

to a trustee, in trust that he will, first, make the grantor a reasonable allowance for the comfortable support and maintenance of his family, and the education of his children; secondly, that he will pay all the grantor's debts, and the debts incurred in the execution of the trust; and, thirdly, that he will then convey the legal title to the property undisposed of to the grantor's children; and delivers the deed, as also the possession of the property, to the trustee, who accepts the trust, the trusts in favor of the grantor's creditors and children become perfect, and cannot afterwards be divested or revoked by any act of the grantor or trustee.

3. In such case, a court of equity will enforce the trust, at the instance of the grantor's children; and if the bill allege that the trustee has paid all the debts, the creditors are not necessary parties to the bill.

4. A bill should not be dismissed for the want of proper parties, unless the objection is taken in the court below; but if the objection is there taken, and complainant refuses to amend, his bill may be dismissed without prejudice.

5. Where a trustee purchases at his own sale, the purchase is liable to be set aside, if the *cestuis que trust* make known their dissatisfaction within a reasonable time, and have never ratified or confirmed the sale, after being informed of every fact connected with it in the knowledge of the trustee necessary to enable them to form a correct judgment.

6. Where a father by deed creates a voluntary trust in favor of his children, who are minors, and delivers the deed and the property conveyed by it to the trustee, who accepts the trust, the grantor's ratification of a purchase by the trustee at his own sale does not conclude the beneficiaries.

7. And if the trustee renders an account to the grantor, which is casually examined by his son, one of the beneficiaries, not being at the time aware of his own interest in the trust, this does not render it, as to him, a stated account.

8. A cross bill which sets up matter not pertinent to that of the original bill, and seeks no relief against the complainant, is without equity, and should be dismissed.

ERROR to the Chancery Court of Greene.

Heard before the Hon. W. W. MASON.

The complainants below, who are also plaintiffs in error, set forth that they are children of Nelson Andrews, and as such beneficiaries in a deed of trust executed by said Nelson Andrews to Matthew Hobson, deceased, as trustee, for the benefit of the creditors of said Nelson Andrews, and then for the use and benefit of complainants. By this deed, (which is exhibited with the bill,) it appears that sundry tracts of land, and a number of slaves, were conveyed to said Hobson on the trusts aforesaid. The bill further charges that Hobson, as such trustee, took possession of the plantation and slaves so conveyed, and continued to possess and use them from the 28th day of March,

1839, until the 1st day January, 1843, when he advertised and sold the whole estate, both real and personal, and became himself the purchaser, at rates greatly below the true value of the property; and that competition in bidding at said sale was hindered by the conduct of said Hobson, who made the impression on the minds of the persons present, that he was causing the property to be bought in for the benefit of complainants; that Hobson did not bid for the property himself, but that he procured a gentleman to bid it in, to whom he conveyed after the sale, and who immediately reconveyed to said Hobson; that no money was paid on such sale.

The bill further charges, that the proceeds of the plantation, during the time Hobson held it as trustee, were amply sufficient to pay off all the debts of Nelson Andrews intended to be secured by the deed, but that Hobson pretends that such was not the case, and that even after the sale of all the trust property, all the debts were not extinguished; that some of the complainants are infants; that those who are of full age have in vain endeavored to get Hobson to make a fair and full exposition of the accounts and vouchers connected with his management of the trust estate.

They further allege that the sales made under the trust deed are illegal and fraudulent as to them, and pray that it be set aside, and Hobson and Nelson Andrews be made to account together, and that the balance of the trust estate be decreed to them.

Hobson answers, admitting the making of the deed as it is set out in the bill, and that the land and slaves conveyed by it are also rightly set out; he further admits that he sold the property as trustee, and that it was bought in by two others for him, and at his request. He insists the sale was fair, and that the property brought its full value; that the sale was made in pursuance of power vested in him by the deed, and the proceeds arising from it were insufficient to satisfy the debts secured by the deed; that the crops raised on the lands, when superadded to the proceeds of the sale of the trust property, did not pay the debts, but a balance of about $2,000 remains unprovided for; that he had paid most of the debts out of his own means, and one object of the sale was to reimburse himself for these advancements. With his answer, he exhibits an account cur-

rent, between himself and Nelson Andrews, in relation to the debts chargeable on the trust estate, and avers that he had read it over to said Andrews, who admitted its correctness, and that the complainant Andrew S. Andrews had seen it, and had it in his possession for about two years, without objecting to any portion of it. He avers that it is a fair and correct accounting, and that the complainants should not be allowed to disturb it. The answer concludes with a general demurrer to the bill.

Nelson Andrews answers, admitting the truth of the allegations of the bill.

There are several amended bills, and two bills of revivor; but the former relate only to the matter of account, and the latter are filed to bring in parties as representatives of those who had died *pendente lite*. These, so far as they are important, are noted in the opinion, as also the cross bill of Nelson Andrews, and the matters arising out of it.

On the hearing in the court below, the Chancellor dismissed both bills, and his decree in this behalf is here assigned for error.

E. W. Peck and S. F. Hale, for plaintiffs in error:

Although a court of chancery might not enforce the specific execution of a voluntary covenant or agreement, made by Nelson Andrews, to create this trust for the benefit of complainants, who are his children; yet, as the trust has been created by him, and fully executed on his part, he having conveyed by deed the legal title to the trustee, and on his part renounced the dominion and control of the same, and the trustee having accepted the trust, and covenanted to execute it, a court of equity will interpose and enforce its execution.—6 Vesey 661; 2 Story's Eq. § 973; 3 Brown's Ch. R. 14, note (A.)

But it is said that the right to sell upon a certain contingency, which is vested in the trustee by the deed, is a power; and although improperly executed by the trustee, that it might be ratified by the donor. There would be some force in this suggestion, if the right to sell conferred on Hobson was a mere naked power; but it is a power coupled with a trust, and that trust is in favor of these complainants and others. Suppose Hobson had refused to execute the power; these complainants could have invoked the aid of a court of equity to compel its exe-

cution, because they are parties in interest.—2 Story's Equity § 1060. But Hobson has executed the power improperly; certainly, then, they are the proper parties to apply to the court to set aside the improper execution, and have it executed properly. Their interest cannot be impaired by the act or omission of Nelson Andrews, who has no interest, and who does not in any way represent them or their rights. All the authorities hold, that such a sale by a trustee will be set aside, not at the election of the grantor in the deed or donor of the power, but at the election of the beneficiaries. To hold otherwise would be to make their rights dependent on the caprice of another, having no interest in common with them.

If a trustee, or person acting for others, sells the trust estate, and becomes himself the purchaser, or interested in the purchase, the *cestuis que trust* are entitled, as of course, to have the sale set aside, and the property re-sold under the direction of the court; and this, whether the sale was made privately or at public auction. However fair and honest the transaction, and however innocent the purchaser in a given case, public policy requires that the sale should be set aside at the election of the *cestuis que trust*, although it was beneficial to them, because, in much the greater number of cases, no court is adequate to the investigation of the truth. The *cestuis que trust* are not bound to prove, nor the court to determine, that the sale was not made in good faith and for a full consideration. The facts may be so, and yet the parties may not be able to show it. The rule is intended, not to remedy an injury, nor to recompense a fraud, but to guard against the hazard of abuse, and prevent the possibility of their commission; to remove the trustee from temptation, and thus secure the rights of the beneficiaries. Hence the trustee is not permitted to change his relations to the trust property by his own act, without the consent of the *cestuis que trust;* but, after a sale and purchase by himself, he will still be considered, by a court of equity, as holding the property subject to all the original trusts. Nor is there any hardship in the rule, because the trust estate will stand as a security to him for any proper advances he may have made.—4 Howard's U. S. R. 552; 2 Johns. Ch. 252, 265; 1 Hopkins' Ch. 515, 524; White & Tudor's Lead. Cas. in Eq. 125, (65 Law Lib.,) and cases cited in notes; 1 Story's Eq. § 322; 4 Porter 283; 7 Sm. & Mar. 409.

That the trustee is a mortgagee, or otherwise interested in the proceeds of the sale, does not affect the principle above stated.—4 How. *supra;* 3 Sanford's Ch. R. 61; 3 Yerg. 201; 2 Dev. Eq. R. 292; White & Tudor's Leading Cases, *supra.* The case cited by defendants' counsel, from 1 Jac. & W., is not in derogation of this principle, but sustains it.

Where there are infant *cestuis que trust,* as in this case, the trustee can only purchase by leave of a court of chancery.—5 Vesey 682; 13 *ib.* 601; 1 Ball & Beatty 418. And an infant can do no act to confirm the sale.—1 Ball & Beatty 338.

But it is insisted, that the sale has been so far ratified that it cannot now be set aside at the instance of these complainants. We have seen that no act of Nelson Andrews can operate as a ratification of the sale, as against these parties, because he in no way represents their interests, as they have vested rights under the deed independent of him. But the facts do not show a ratification of the sale, even as to him, because the law requires that the act of ratification should be freely done, not under the pressure of want or dependence, as Nelson Andrews was immediately after the sale; that he should know that the transaction was impeachable, and that he should intend at the time, by the act done, to confirm it.—White & Tudor's Lead. Cas., notes on p. 136; 1 Ball & Beatty 338; 2 *ib.* 317. All the facts of this case show, that Nelson Andrews was in a helpless condition, and in the power of Hobson. It appears, toc, that he was an illiterate man; and it is not shown that he knew the sale could be impeached, or that he did any act by which he intended to confirm it; but the contrary is to be inferred from the facts in evidence.

But there can be no pretence that these complainants at any time confirmed the sale. The only fact relied on to show a confirmation, is, that the account was at one time seen in the hands of one of them, the only one then of age. Hobson never rendered any account to them, or requested any action on their part; and the first we ever hear of them is their disaffirmance of the transaction, a few months after this account is seen in the hands of Andrew S. Andrews. Even if he had ratified the sale, after full knowledge of all the facts, his ratification could not bind the others, who did not and could not consent to it.—1 Ball & Beatty 338; 10 Ala. 910; 1 Jac. & W., *supra.*

The only departure from the strict rule laid down in England, and also in most of the States, is in the case of sales of personal property by an executor or administrator, having an interest in the property; and even that departure was predicated upon a supposed necessity.—2 Stewart 47; 4 Porter 283; 6 Ala. 894. And in the case of McCartney v. Calhoun, 17 Ala. 303, the court expresses its regret that the rule was ever departed from. In this case, Hobson had no interest in the property, but only an interest in the proceeds of sale; and that interest was voluntarily acquired by him after the creation of the trust.

The cross-bill ought to have been dismissed.—Nelson & Hatch v. Dunn, 15 Ala. 512.

Syd. Moore and Wm. M. Murphy, *contra:*

The bill is fatally defective on demurrer, first, for want of proper parties. It should have been so framed, that the creditors might come in, and assert their rights. The rule in equity requires that all persons in interest must be made parties.—Story's Equity Pleadings § § 72, 76. It is also bad on demurrer, because it does not aver that the debts of the grantor have all been paid, or that the property is more than sufficient to pay all his debts. Unless this was the case, the complainants had no interest in the property, and could not maintain this suit. This fact, therefore, should have been alleged distinctly and positively, not inferentially. If, however, the allegation had been made, the proof would not sustain it. The allegations of a bill must be made with reasonable certainty and precision; they must be direct and positive, not uncertain and inconclusive.—3 Ala. 253; 8 *ib.* 767; 16 *ib.* 423; Story's Eq. Pl. § § 242, 251, 255, 261, 403.

The payment of all the grantor's debts, was a condition precedent to complainants' having any interest in the property; and a court of chancery cannot relieve against a condition precedent.—3 Eden's R. 348; Story's Eq. Pl. 261.

The complainants in this case, as the bill itself shows, are at best mere volunteers, seeking specific relief and performance against the voluntary donor and a purchaser for value. Children claiming under an ante-nuptial settlement, are regarded as purchasers; but children claiming under a post-nuptial settlement, are mere volunteers.—Holloway v. Headington, 8 Simons,

(11 En. Ch. R.;) 1 Craig & Phil. 138, (18 En. Ch. R.) Courts of equity will not enforce a mere gratuitous gift.—1 Story's Equity §§467, 433 and notes; 2 *ib.* §§706, 793; 1 Vesey Jr. 50; 12 *ib.* 39; Edwards v. Jones, 13 Con. En. Ch. R. 377; 6 Vesey 656; Meek v. Kettlewell, 23 En. Ch. R. 464; Pulvertoft v. Kettlewell, 18 Vesey 84; Holloway v. Headington, 11 En. Ch. R. 324; 4 John's. Ch. R. 498; Forward v. Armistead, 12 Ala. 127; 1 White & Tudor's Leading Cases 203, 213. Mere voluntary conveyances will not be enforced in equity, even against a subsequent purchaser with notice.—Story's Equity § 426; Hill on Trustees 83, 84, 85.

Where an agreement is entered into between two persons, on a valuable consideration passing between them, for the benefit of a third person, from whom no valuable consideration passed, equity will not enforce that agreement at the instance of such third person, because he is a mere volunteer.—Crompton v. Vasser, 19 Ala. 260; Collier v. Mulgrave, 21 Keen 81, 98; Hill v. Gorman, 1 Beav. 540; 1 White & Tudor's Leading Cases (69 Law Library) 212; 1 Story's Equity §§176, 433; 18 Vesey 101; 1 Johns. Ch. 261. That this trust is executory, see White & Tudor's Leading Cases 38, 39, 42, 43. A voluntary grantee, upon however fair and meritorious ground, is considered in equity as having no equity whatever, against a subsequent purchaser for a valuable consideration with full notice, who will receive the aid of a court of equity to enforce the specific performance of a contract of purchase.—5 Peters' R. 264, 279; 1 American Leading Cases 61.

As to the validity of the sale: By this deed, Hobson was merely the agent of Nelson Andrews, for the payment of his debts and other things.—Hill on Trustees 83; Elmes v. Sutherland, 7 Ala. 262. Andrews has taken no steps to have the sale set aside, but has confirmed it: The power was revocable.—Hill on Trustees, *supra.* It is conceded that, as a general rule, courts of equity will, without inquiring into the fairness of the sale, or the adequacy of consideration, set aside a sale of the trust property made by a trustee to himself, upon the application of the party beneficially interested. The sale, however, is not void, but voidable only, (9 Ala. 961:) the right is one of election. But there are various exceptions to this general rule, within the influence of some of which the case at bar is sup-

posed to fall. In the first place, no one but the *cestui que trust* can object to the sale, or have it set aside.—14 Johns. R. 407; Lomax on Executors 350; White & Tudor's Leading Cases 144. In this case, the *cestuis que trust* are Nelson Andrews and his creditors: until all his debts are paid, and there is an ascertained surplus in the trustee's hands, the complainants cannot be deemed *cestuis que trust.*

The *cestuis que trust* may confirm the sale; and in that case, neither he nor any one claiming under him can afterwards disaffirm it.—12 Vesey 355; White & Tudor's L. C. 136, 144. Sales made by trustees will not be set aside, if there has been a ratification, or affirmance, or acquiescence, or failure to apply to set it aside within a reasonable time.–7 Sm. & Mar. 419. Objections to the sale must be made within a reasonable time; otherwise, the acquiescence of the *cestuis que trust* will be presumed; and the circumstances of each case must determine what is a reasonable time.—15 Petersdorf's Abr. 209; 4 Cowen 718; 7 Sm. & Mar. 409; 2 Story's Equity 1520; 5 Vesey 678; Hill on Trustees 438; 5 Ala. 78, 99; White & Tudor 144. In the case cited from 7 Sm. & Mar., C J. Sharkey lays down the rule, that the assent of a minor to such sale willl be presumed, unless he takes immediate steps, on coming of age, to have it set aside.

Here, not only did Nelson Andrews ratify and confirm the sale, but also Andrew S. Andrews, one of the complainants, acquiesced in it for several years after he came of age, with full knowledge of all the facts; and this amounts to a ratification by him. It might be contended, that this could not affect the other children, who are minors; but in equity, as at law, where parties sue jointly, if one is barred, all are barred.—Hardeman v. Sims, 3 Ala. 747.

It is also held, that a trustee may purchase from a *cestui que trust*, even at private sale, if no unfairness appear.—9 Vesey 235. In some of the courts it is held, that a trustee should apply to a court of chancery for leave to buy at his own sale.—6 Vesey 682; 2 Johns. 252. But this rule, which would lead to delay, expense and multiplicity of suits, has never been adopted in this State. Under the circumstances of this case, a court of chancery would have given Hobson leave to purchase at his own sale; and as it was done without such application, equity will

consider that as done which the court itself would have ordered to be done.

In this State, and in some others, another qualification or exception to the general rule has been adopted, viz., that a trustee having a pecuniary and beneficial interest in the property may buy at his own sale, if it is properly conducted.—2 Stewart 47; 4 Porter 283; 6 Ala. 893; 8 *ib.* 684; 4 Hill's Ch. R. 401; 2 Hen. & Mun. 245; 2 N. H. 218. It is true, executors and administrators are particularly spoken of, but they are recognized by all the courts as trustees.

The trustee in this case having advanced his own money to pay the grantor's debts, to an amount greater than the value of the trust property, became thereby a purchaser of the land, and acquired an absolute right to the trust property, by operation of law.—Willis on Trusts 78; Plowden 185; 1 Ch. Cas. 199; 1 Jac. & W. 64; Toller on Executors 238; Pirtle's Digest 425; 4 Porter 365; 1 Mo. R. 312. Putting the sale out of view, then, Hobson would be considered, both at law and in equity, as a purchaser for value, and entitled to hold the property as his own.

Hobson having furnished an account of his trusteeship to Nelson Andrews, which the latter retained nearly two years without objection, this constitutes a perfect and complete bar to any further accounting.—Langdon v. Roane, 6 Ala. 518; Powell v. Powell, 10 Ala. 900; Phillips v. Belden, 1 Eden's R. 1; 1 Story's Equity § 523; 3 How. Miss. R. 393. This account, having been called for by the bill, is evidence. Its correctness was admitted by Nelson Andrews: it was kept and examined by Andrew S. Andrews. This constitutes it a stated account, admitted by the parties. The attempt made to surcharge and falsify it utterly failed. The complainants are also bound by this as a stated account, though some of them are minors, because Hobson was only bound to account with Nelson Andrews, as they virtually admit; because Nelson Andrews, their father, was their natural guardian, and competent to settle on their behalf; and because the account was submitted to Andrew S. Andrews, then of age, and was by him examined and retained without objection.

This stated account, besides being a bar to any further accounting, shows that the debts paid by the trustee amounted to

more than the entire value of the property; and, therefore, that nothing is left for the voluntary donation to complainants. The complainants, then, have no right to be heard in this court, and certainly none to any part of this property.

The legal title to the property was vested in Hobson by the deed, and also by the sale until set aside.—2 Cowen 796; 7 Johns. Ch. R. 25. And where the equities are equal, he who has the legal title must prevail.—1 Story's Equity § 64. Nelson Andrews' creditors having under this deed a prior and superior equity to the complainants, and Hobson having paid off their debts, he will be substituted to their rights and equities; and having then a superior equity, as well as the legal title, he must prevail over these complainants.

As to the cross bill, see Hatch v. Dunn, 15 Ala.; Dan. Ch. Pr. 1746; Story's Eq. Pl. 399; 7 Johns. Chan. 252; Cooper's Eq. Pl. 85; 3 J. J. Marsh. 252.

LIGON, J.—1. No question can arise on the action of the Chancellor in overruling the demurrer to the original bill in this case, for the obvious reason that the defendant has assigned no cross errors on the record, and we can only decide on such as are assigned and insisted upon in this court.—Van Eppes v. Smith, 21 A. R. 317.

2. It is urged by the defendant in error, that the bill is so fatally defective, in setting out the cause of action, that no case for relief is made out, and on this ground alone the decree of the Chancellor should be sustained. If this be true, this court will certainly dismiss the bill, regardless of any demurrer, or motion to dismiss for want of equity in the court below.

The complainants set out in their bill, that at the time it was filed they were the only surviving children of Nelson Andrews, one of the defendants, and as such beneficiaries under a certain deed of trust made by him to the defendant Hobson, bearing date the 28th day of March, 1839, a copy of which deed is exhibited with the bill.

This deed conveys to Hobson an absolute title to the land and slaves named in it, and then proceeds, "Now this deed is upon trust, that the said Matthew Hobson shall take possession of all and singular the several parcels of land herein conveyed, and of the negroes herein mentioned, and shall by himself, or by his

agents or attorneys to be chosen by him, and at his discretion, proceed to work the said slaves, and cultivate the said lands, and in all things manage the same in a husband-like manner, and shall have the disposition and management of the crops and products of the same, and from the products and proceeds thereof shall allow to the said Nelson Andrews a reasonable allowance for the comfortable support and maintenance of his family and the education of his children; and shall proceed to pay off and discharge the debts now contracted of the said Nelson Andrews, with such interest as has or may accrue thereon, and costs, and charges; he, the said Matthew Hobson, having the authority to compromise, get day of payment, or otherwise arrange and settle the same, to borrow money for the purpose of settling the same, and other things to do as if the same were his own; and upon this further trust also, that, if the said Matthew Hobson, his executors or administrators, should find the crops insufficient to satisfy said debts, within a reasonable time, either from a failure of the crops, from the multiplicity of the debts, or other cause, or should, in his or their discretion, think it most advisable to make sale of all or part of said land or negroes, or either of them, for the purpose of paying the same, or paying off such liabilities as he may incur in extending or getting time upon any of them, then it shall be lawful, and the said Matthew Hobson is hereby empowered, to proceed and sell any and such portion as he shall deem proper, upon giving thirty days notice in three or more public places in Greene County, at auction in the town of Greensboro, to the highest bidder, either for cash, or on a credit, as shall seem to him most proper; and, upon such sale or sales, (should more than one take place,) shall make the purchaser or purchasers good and sufficient deed or deeds to such of said lands as may be sold, conveying them in fee simple, and shall also make sufficient conveyances of such of said negroes as shall be sold, and shall apply the proceeds of such sale or sales as hereinbefore specified. *And this deed is upon the further trust also*, that so soon as the said Matthew Hobson, his executors and administrators, shall have paid off all the debts now existing of the said Nelson Andrews, and discharged all the liabilities of the said Andrews, or of himself, or of themselves, contracted under or by virtue of the trust now taken upon him, the said Hobson, he, the said Hobson, his executors and admin-

istrators, shall convey to the children, then living, of the said Nelson Andrews, all the lands herein conveyed, then remaining unsold, and all the negroes herein mentioned, and then alive and unsold, and their increase, to be held by them as their sole and absolute property, subject only to the following condition and trust: that the said negroes and land so conveyed to them, shall, during the lives of the said Nelson Andrews and his wife, Polly Andrews, and the life of the survivor of them, be subject to the maintenance of the said Nelson Andrews and the said Polly Andrews, or the survivor of them, and the proceeds thereof, so far as the same shall be necessary, shall be so appropriated, and the said Matthew Hobson, his executors or administrators, is and are hereby directed to convey the same in trust accordingly. And the said Matthew Hobson doth assent to the trust hereby created, and accept of the same, and bind himself to the faithful execution of the same."

This deed is executed by Nelson Andrews and Hobson; it was acknowledged by them before a notary public, and duly recorded in the office of the clerk of the County Court of Greene County.

By its terms, the property, both real and personal, is "granted, bargained, sold and conveyed" by Nelson Andrews to Matthew Hobson, upon the trusts above mentioned, and it is alleged in the bill that Hobson went into immediate possession of the property, and continued to possess and manage it by himself and his agents, until the sales in the year 1843.

It is clear that Nelson Andrews, by the terms of this deed, and the delivery of the possession of the property to Hobson, divested himself of all legal estate in it, and could not have revoked it, had he desired to do so. The title vested in Hobson, on the delivery of the deed, so that the trust in favor of the creditors and children of Andrews is vested, and it could not be afterwards divested by any act of Nelson Andrews alone, nor by any concurrent act of Andrews and Hobson, for the reason that the former had parted with all control over it whatever, and the latter had received it subject to the specific trusts of the deed under which he holds it. To allow either, or both of them, to use the property for any other purpose than those set forth in the deed itself would be a fraud upon the rights of the beneficiaries; and although the deed, so far as it relates to the complainants, is to a certain extent voluntary, yet, after it was delivered, it

could not be revoked by the grantor, nor will it be tolerated that the trustee, who covenants to hold for them, shall cast off his trust, and set up this fact against their title.—2 Story's Eq. § 973 and notes 3 and 4.

It is insisted, however, that, although the deed vests Hobson with the legal estate, and defines the trusts in subjection to which he holds it, yet, as no *valuable* consideration passed from the *complainants* to the grantor, the trust in their favor will not, at their instance, be enforced by a court of equity; that persons standing in this relation are mere volunteers, and will not be allowed to set up their claims against the voluntary donor, or a purchaser for value.

That a *cestui que trust*, who has paid no valuable consideration to the grantor, can enforce the execution of the trust in a court of equity against the *trustee*, has already been decided by this court, on very full consideration, in the case of Sledge's Adm'rs v. Clopton, 6 A. R. 598; and that he will be allowed to do so against the grantor, and a purchaser for valuable consideration with notice of the trust, has also been decided in the case of Eldridge *et al.* v. Turner *et al.*, 11 A. R. 1049. With these decisions we are entirely satisfied; for it is the peculiar province of a court of chancery to protect the interest of beneficiaries, who, having no legal, yet a good and complete claim in equity, cannot sue at law. If no relief in chancery remained to them, a fraudulent grantor and tustee might appropriate the trust estate to their own use, and thus defeat the ends of justice with impunity.

But it is said that the necessary parties complainant are not made by this bill; that the creditors of Nelson Andrews are indispensable, and as they are not brought in, the bill should be dismissed. Under the form of this bill, we do not think the creditors, if any there be, necessary parties complainant. It is, in effect, alleged that the debts are all paid; and if this be so, they have now no interest under the deed, and the sole remaining trust in the property is that in favor of the complainants, and in this aspect their bill is framed.

Again: no bill should be dismissed for want of proper parties complainant, unless the objection is taken in the court below; and on suggestion of the names of the parties that are improperly omitted, if, after this, the complainant refuses to join

them by an amendment of his bill, the court may dismiss it without prejudice, but not absolutely.

It is contended, however, that, as Hobson was empowered by the deed to convey the legal estate in the trust property to the complainants, on the happening of a certain contingency, it shows that something remained to be done before the trust became complete in the complainants; that the deed of Nelson Andrews to Hobson is a mere power, and consequently revocable at the will of the grantor. It is further urged that, as the grantor assented to the sale of the trust property, such assent amounted to a revocation of the power. An examination of the deed, and the trusts created by it, will readily show the fallacy of the first part of this argument, and establish, beyond controversy, that the *trust exists*, independent of the power to Hobson to convey *the legal* estate to the complainants, and that this power is coupled with the trust. Consequently it is irrevocable, and a court of equity will compel the execution of the power.—2 Story Eq. § 1061, and authorities there cited in notes 1 and 2.

The trusts of the deed are as follows:

1. The trustee is to "allow the said Nelson Andrews a reasonable allowance for the comfortable support and maintenance of his family and the education of his children," so long as the property remains unsold.

2. He is to pay the expenses of keeping up the plantation, with all debts created for this purpose by himself or agent, and the debts of Nelson Andrews existing at the date of the deed.

3. When these trusts are executed, he is to convey whatever remains of the property to the children of Nelson Andrews, to be held by them "as their sole and absolute property," subject to the trust, that Nelson Andrews and his wife shall be supported during their joint lives, and the life of the survivor of them, from the proceeds of the property so conveyed to their children.

How far this deed would have been upheld against a pre-existing creditor of Nelson Andrews, who would not accept the provision made in it for his benefit, we need not determine, as the question presented for our adjudication does not arise between such creditor and the grantor, or one claiming under him, but is between the trustee and the *cestui que trust*. The rights of the two are essentially distinct, and are governed by entirely different rules. Between the trustee and the beneficiary, the

deed must regulate their rights, and the former will not be permitted to deny the right of the latter, but he may show that he has parted with, or forfeited it, in such a manner as to deprive himself of the privilege of calling upon the trustee to account concerning it.

Had Nelson Andrews executed a voluntary deed, by which he covenanted with Hobson, or any other person, that at some future time he would convey to him property in trust for his children, this would not amount to the creation of a trust, and, being without consideration, would not authorize a court of equity to interfere in behalf of those in whose favor he promises to create such trust, in order to compel him to do so; for, in such case, he would have the right to disaffirm his agreement, and the *locus penitentiæ* remains to him until the deed creating the trust is made. But we apprehend the rule would be very different, if, in pursuance of such an agreement, he were to execute a deed to the trustee, investing him with the legal title to the property, and declaring the trusts which he engrafts upon it, defining them with certainty, and appointing a time when the trust shall cease, and the beneficiary receive the legal estate. A direction in such a deed, pointing out the terms and manner in which the trustee shall convey the *legal estate* to the beneficiary, cannot affect the trust created by it; neither can it be construed to the prejudice of the rights of the beneficiary, nor be appealed to for the purpose of showing that the trust is incomplete until the deed required to be executed by the trustee to the *cestui que trust* is made. Such a construction would wholly pervert the meaning of the instrument, and render that necessary to the *creation of the trust*, which is only required by the parties to be done in order *to terminate it and invest the beneficiary with the legal estate.*

The trust in this case was perfect the moment the deed was executed; and the value of the property, and not the nature of the interest of the children, is rendered contingent, on account of the preference given to creditors by the deed. Their *right* to the property, if any remained in the hands of the trustee after the debts were paid, was as complete in equity before the payment of one dollar of the debts, as it could become after all the debts were paid. The only difference is this: they could not call on the trustee to convey to them *the legal estate* in

the property *before* the debts were paid, while the deed gives them this right after such payment is made.

2. The bill seeks to set aside a sale made by the trustee of all the property mentioned in the deed, at which he became the sole purchaser, and the question is, should this be done under the circumstances of the present case?

It is insisted in favor of the validity of the sale, that the trustee had advanced his own funds in payment of the debts of the maker of the deed of trust, (which were secured by its provisions,) until nearly or quite all the debts had been paid by these advancements and the proceeds of the crops raised on the plantation, and that under these circumstances the trust of Hobson was coupled with an interest in the subject matter of that trust, and therefore he had a right to purchase at his own sale.

It is conceded by the defendant in error, that sales of trust property, at which the trustee becomes the purchaser, will ordinarily be set aside at the instance of the *cestui que trust*. But as some exceptions have been engrafted upon this general rule by this court and a few others, it is supposed this case comes within those exceptions; and even if it does not, the sale here has been ratified by Nelson Andrews, the grantor in the deed, and acquiesced in by the complainants for so great a length of time, that it must be treated as valid, and cannot now be disturbed. The rule laid down by Lord Alvanley, in Campbell v. Walker, 5 Ves. Jr. 680, we apprehend to be the true one, in cases of sales by trustees, at which they become the purchasers. It is this: "that a trustee, purchasing the trust property, is liable to have the purchase set aside, if, in any reasonable length of time thereafter, the *cestui que trust* makes known his dissatisfaction." This rule has been invariably acted upon in the English courts, so far as we have been enabled to see, with the solitary exception of the case of Whicheste v. Lawrence, 3 Ves. Jr. 750, in which Lord Rosslyn held, that such a sale was good, unless it was shown that the trustee gained some advantage by the purchase. This case was never followed, but is overruled by Lord Eldon, in the cases of *Ex parte* James, 8 Ves. Jr. 345, and *Ex parte* Bennett, 10 *ib.* 381; and by Lord Alvanley, in the case of Campbell v. Walker, *supra*.

Our own court has departed from it in the case of executors and administrators, who have an interest in the estate which

they represent, in the cases of Brannon v. Oliver, 2 Stew. 47, and McLane v. Spence, 6 Ala. 897; holding that these may purchase, subject to have the sale set aside for unfairness or fraud. While we do not feel at liberty to depart from these decisions at this late day, we confess that the reasons upon which they are placed by the court that made them have failed to convince us that the departure is proper.

In the case of Saltmarsh v. Beane, 4 Por. 283, the court refused to apply the principles settled in the case of Brannon v. Oliver, taking a distinction between executors and administrators and other trustees; and intimating very pointedly, that the decision in Brannon v. Oliver must be confined alone to cases of sales made by executors and administrators, inasmuch as the peculiar reasons on which it is based are inapplicable to any other class of trusts. We are willing to let it rest at that point, but wholly averse to extending it, or multiplying exceptions to a general rule so salutary as that which prevails in the English courts, and which tends so strongly to guard the trustee from those temptations to unfairness and fraud to which the adoption of a contrary one would expose him.—14 Ala. 149.

We are of opinion, therefore, that the purchase by Hobson, the trustee, cannot stand, if it is shown that the complainants are dissatisfied with it, and have made known that dissatisfaction within a reasonable time, and that they have never ratified and confirmed it, after being fully informed of every fact connected with it, of which the trustee himself was possessed at the time of such ratification, necessary to enable them to form a correct judgment.

It is contended that the sale was consented to and fully ratified by Nelson Andrews, and that Andrew S. Andrews, who was of full age when it took place, and who saw the account current which was rendered by Hobson to Nelson Andrews, never expressed any dissatisfaction until a short time before the filing of the bill in 1848. As to the other complainants, they were then infants, and had no power to affirm it.

The consent of and ratification by Nelson Andrews are wholly immaterial, so far as the rights of the complainants are concerned, even if they are shown to exist. He has parted with all title in the *corpus* of the trust property, and has only reserved to himself an interest in so much of the profits, arising from the

use of the lands and slaves, as will support himself and wife during their lives, and the life of the survivor. He cannot, on this account, be allowed to conclude these defendants by any act of his.

The fact that Nelson Andrews is the natural guardian of his children does not, as the defendant's counsel supposes, give him any greater power in this respect. No guardian has the power to divest the title of his ward to property in which he is legally or equitably interested, unless it be done under the sanction of the court to which he is amenable; and, as he has no such power himself, he will not be allowed, by his consent, to give validity to the act of another, irregularly and illegally done, which will have that tendency.

There is no evidence which shows affirmatively that Andrew S. Andrews, the only one of the complainants who had attained his majority at the time of the sale, ever distinctly ratified the sale made by Hobson. His assent, it is said, must be presumed from the fact that he saw the account current which was made out and handed to his father by the trustee. It does not appear that Hobson ever gave him full and complete information concerning the affairs of the trust estate, or, indeed, that he imparted anything to him concerning it, as one who was interested in it. All direct communication between him and the family of Nelson Andrews, upon this subject, seems to have been confined to Nelson Andrews alone. Under these circumstances, the time which elapsed between the sale and the filing of the bill is not unreasonably long to enable Andrew S. Andrews to ascertain the facts necessary to prepare him to act understandingly in the assertion of his rights.—Roche v. O'Brien, 1 Ball & Beatty 338. From all that is found in this record, it does not appear that Andrew S. Andrews ever examined the account rendered to his father, for any other purpose than that of informing the latter of what it contained; and this was rendered necessary by the fact that his father was illiterate and could not read it for himself. It seems to have been treated by all parties, at that time, as an affair in which Nelson Andrews and Hobson were the only parties interested, and doubtless such was then the opinion of all who were concerned in it. It is evident, from the answer of Hobson to the original bill, that he did not regard the complainants in this suit as parties to whom he was bound to account,

or who were entitled to any disclosures from him; and under these circumstances, it would be a very rash presumption to suppose that he did, in fact, render the one, or make the other.

The decree of the Chancellor dismissing the original bill is, therefore, erroneous, and must be reversed.

As the case must go back for an account, it may be as well to lay down a few general principles, which must govern the master in taking it.

The facts shown by the answer and proof are not sufficient to give to the account rendered by the trustee to Nelson Andrews the dignity of a stated account, as against these complainants, although, as to Nelson Andrews, such would be its character. It was not rendered to Andrew S. Andrews, as an account to which he was in anywise a party, nor does his attention appear to have been called to it in that aspect at all. It would be highly unjust to apply to him the rule, which governs in cases where accounts are rendered to the party who has made them with a view, not only to their inspection, but their settlement also. In such cases it is both just and right to charge the debtor with their payment, if he retain them for a long time, without objecting to them, unless he can surcharge and falsify them. It is right, in such cases, to throw the *onus* of showing errors in the account on the party who thus retains it.—Langdon v. Roane's Adm'r, 6 A. R. 518; 10 A. R. 900. But it will not do to apply this rule to cases in which the accounts between an illiterate father and his creditor casually fall into the hands of the son, who examines them solely with the view of informing his father of their contents, and without being aware, at the time, that his own interests are involved in their accuracy.

It is clear, that such of the complainants as were infants at the time the account was rendered, are not bound by it.—Powell v. Powell, 10 A. R. 900.

As the defendant took no title to the land and slaves by his purchase at his own sale, they must still be regarded subject to the trusts of the deed under which he took possession of them, and the account in the court below must be taken in reference to these trusts.

Hobson's representative, on such accounting, must, as to pay-

ment, stand in the place of the creditors, whose demands his intestate has paid, and be accounted with as such.

We deem it unnecessary to give more specific instructions in this respect, and leave it with the Chancellor to add such others as will guide the master to correct results. We will only add, that there is nothing in the whole case which tends, in the slightest degree, to raise a presumption of unfairness or fraud on the part of the trustee; the errror into which he fell, and for which the sale is here set aside, is solely a mistake of his powers and his rights.

In relation to the cross bill of Nelson Andrews, it need only be said, that much the larger portion of the charges and allegations which it contains have no connection whatever with the matters involved in the original suit. It sets out a partnership between said Andrews and his co-defendant, Hobson, in stock raising, with which the complainants in the original bill have nothing to do, and which is entirely unconnected with the trust. It also sets out, that Hobson sold three negro slaves belonging to Nelson Andrews, which were not included in the deed of trust under which the complainants claim, and consequently, in which they have no interest; with many other matters, wholly foreign from any legitimate defence which could be made to the original bill, and which concern Nelson Andrews and Hobson alone.

It is well established, that a cross bill is a mode of defence to the original bill, and its matter must be pertinent to that suit.—Danl. Ch. Prac. 1742; Nelson & Hatch v. Dunn, 15 A. R. 501.

On this cross bill no relief is sought against the complainants in the original bill, nor would its allegations justify the court in granting any. Under these circumstances, it cannot be allowed to stand as a cross bill, and was properly dismissed by the Chancellor. His decree, in this respect, is consequently affirmed.

A decree must be here rendered against Nelson Andrews for the costs on the cross bill in this court and the court below; and on the original bill, against the administrator of Hobson for the costs of this court only, leaving the costs of the court below to be hereafter disposed of by the Chancellor, as to him shall appear right.

RAWLS *vs.* DOE EX. DEM. KENNEDY.

1. The proviso to the first section of the act of 1843, (Clay's Digest 329 § 92,) applies only to that section, and does not extend to the whole act.
2. The act of 1802, (Clay's Digest 327 § 83,) which bars rights of entry after the lapse of twenty years, is not repealed by the act of 1843, (Ib. 329 § 93,) which limits all actions for the recovery of lands to ten years after the accrual of the cause of action; possessions commencing under the old law are governed by the act which first effects a bar in their favor.
3. In ejectment, where separate demises are laid from several tenants in common or co-parceners, if the statute of limitations has effected a bar against one of the lessors, a recovery may be had on the demises from the others.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. JOHN A. CUTHBERT.

EJECTMENT for a lot of land in the city of Mobile. The declaration laid joint and several demises from Oscar Kennedy, Charles S. Shrieve and Mary, his wife, and Ella Walker, said Oscar, Mary and Ella being the heirs at law of Joseph Kennedy. The defendant having entered into the consent rule, and admitted possession of a portion of the land sued for, the counsel of the respective parties agreed on the following case:

"1. That on the eighteenth day of January, 1817, Wm. E. Kennedy was the legal holder of a Spanish claim for lands in Mobile originally granted to Thomas Price, which was confirmed in 1829, to Joshua Kennedy, as his assignee. The claim, with all the evidence appertaining to it, is recorded in the records of this Circuit Court, and of the Supreme Court of this State, in the cases reported in 7 Ala. R. 882, 11 Ala. R., and 2 Ala. R. 574; and reference is made to this evidence, and to the third and fifth volumes of American State Papers (Public Lands) for the same.

2. That Wm. E. Kennedy, on the eighteenth day of January aforesaid, executed a deed of bargain and sale, by which, for one dollar, he granted, bargained and sold to Joseph P. Kennedy the undivided half of ten acres of land, situated about one mile and a half from the centre of the town of Mobile, at a place known and designated as the "Spring," to include said Spring.

It was understood that the said Joseph was to improve said lands in a short time, for the common benefit. This deed contains a covenant of warranty, and was duly recorded in the County of Mobile.

3. That Joseph P. Kennedy entered upon said lands, but made no improvements of any consequence before his death.

4. That in 1824 Joseph P. Kennedy died, leaving three children, Oscar P. Kennedy, Glovina Kennedy, who afterwards married Robert L. Walker, and died in 1842, leaving Ella Walker her heir at law, and Mary Kennedy, wife of Charles S. Shrieve; and that these, the heirs of Joseph P., are the lessors of the plaintiff.

5. That in December, 1824, Joshua Kennedy purchased from William E. Kennedy his entire interest in the Price claim, with notice of this deed, and prosecuted the claim to its confirmation by Congress, by the act of March 2, 1829.—2 Clark's Land Laws, p. 239.

6. That Joshua Kennedy, immediately after his purchase, claimed and possessed the land as his own, and in the year 1833 he conveyed it to William F. Cleaveland and others, by deed with warranty, who entered into possession immediately.

7. That the possession of said Cleaveland was adverse and continued; he divided this land into lots, and sold them among a large number of persons, who claim the fee simple, and have continuously occupied the same.

8. That John F. Rawls owns and occupies, at the date of the service of the ejectment, one lot in the Price claim aforesaid, described in his consent rule, in that portion embraced in the deed of William E. Kennedy to Joseph P. Kennedy aforesaid, and that his title to the same was regularly derived from Joshua Kennedy and William F. Cleaveland, under their conveyances.

It is further agreed that Glovina Kennedy and Mrs. Shrieve were minors at the time of their father's death, and became of age, the one in 1838, and the other in 1840.

The parties hereto submit their rights to a recovery, either for the whole or a part of the lot above mentioned, upon the facts above stated, and reserve the right to appeal to the Supreme Court," &c.

Upon the case thus made, the court rendered judgment for

the plaintiff, for the lot described in the consent rule, and this judgment is here assigned for error.

The action was commenced in April, 1852.

STEWART, CHANDLER and HAMILTON, for plaintiff in error:

1. The act of 1843 contains two sections. The first section refers to equities of redemption, and attached to it is a proviso. The second section declares the general rule; it provides a bar of ten years after the cause of action accrues.—Without the addition of the general proviso attached to the first section, it is admitted that, under the general rule applied by the courts to regulate the operation of statutes, the enactment contained in the second section would be held to have effect only as to the future after the passage of the act.—7 Johns. R. 477; 8 Wend. 661; 10 *ib.* 363; 2 Greene 181; 1 *ib.* 338; Wilkins. on Limitations 140.

In general, the operation of a new law is confined to the future, but this is not always the case; it is competent for the legislature to provide that a new law, operating upon a remedy, may have a retrospective operation; and where this intention appears, effect will be given to it, but not so as to defeat vested rights.—1 Ala. R. 661; 13 Peters' R. 45, 64; 2 Louis. Ann. R. 611; 3 *ib.* 526; 3 McLean's R. 568; 2 Gall. 103. This principle is expressly recognized in Henry v. Thorpe, 14 Ala. R. 103.

We contend, that the legislature has made such provision in the act of 1843. That act is either prospective only, or it is both prospective and retrospective. The body of the first section clearly looks to a retrospective operation, while the language of the second section may very properly be construed to operate in either way; but, without more, under the general rule, it would be held to a prospective operation. If the proviso found in the first section be applied to both sections, there can be no doubt of the meaning the enactment speaks. It was prepared in the very spirit of the language used by the Supreme Court in 13 Peters' R. 64. It declares the operation of the act to be partially retrospective, and permits any part of the ten years, not exceeding five, to be counted before the date of the act. No possession existing at the date of the act should be defended by that act, against a claim made within five years after its pass-

age. By the use of the proviso, the language and operation of the two sections are made harmonious. Does this proviso apply to the whole act? The proviso itself says that it does. "Where I find the words of a statute perfectly clear, I shall adhere to the words," says Lord Denman, in 4 Nev. & M. 426. Where a well known word is used, the well known meaning shall be applied.—1 Kent's Com. (7 Ed.) 511; 20 Wend. 561; 13 M. & W. 511; 9 Iredell 149, 150. The proviso says, it governs the whole "*act*," that is, the "act to amend the law in relation to limitations." Certainly, with this language, nothing can justify the court in deciding that "*act*" means "*section*."

2. The claim of Oscar P. Kennedy was barred by the operation of the act of 1802. The acts of 1802 and 1843 both operate, and both may stand together; and if either of them, by its terms, bars a claim, that bar is perfect. This is undeniable, if the act of 1802 is unrepealed; and it is nowhere expressly repealed. The act of 1843 does not expressly repeal it; it is an act "to amend," not an act to repeal; the intention to amend excludes, *ex vi termini*, the intention to repeal, unless the two acts conflict with each other; it does not operate a general repeal, though it may work a partial and particular repeal in specific points of conflict. Repeal by implication is not favored by the law. In the absence of express words of repeal, the presumption is against such an intention, and the two acts shall stand together as far as possible.—24 Pick. 297, and ancient authorities there cited; 3 Ala. R. 628; 6 Porter 231; 9 Iredell 496, 500; 2 Barb. R. 316; 2 Saund. Ch. R. 533.

In cases of apparent contradiction in the operation of acts *in pari materia*, it becomes the duty of the court to diminish the conflict to the least possible amount, and to hold the former act repealed *only* when the repugnancy is absolute and incontrovertible.—See authorities above cited; also, 6 Barb. R. 60; 2 Cran. 358; 3 Gill. R. 138; 3 New Hamp. 473. There is no such repugnancy between the acts of 1802 and 1843, as should induce the court to declare the former repealed by the latter, and thus leave the State without a statute of limitations for ten years. It is a question of intention. The rules of construction adopted by the court are only the means resorted to to discover the intention. The intention may be ascertained, by a consid-

ration of the object desired to be secured, the evil to be remedied, the history, condition and policy of the State.—6 Barb. R. 60; 10 Wend. 363; 3 Barb. R. 306; 2 Saund. 533.—These all contradict the idea, that it was the intention to repeal the act of 1802, and thereby, instead of diminishing, actually lengthen the period of limitation.

CUTHBERT and SEWALL, *contra*:

The defendants in error rely upon the act of February, 1843, and upon the construction given to it by this court in three several cases, which came before it at different times, to the effect that it operated a repeal of the former law on the same subject, and destroyed its effect *in toto*; and that the new law, in all cases where prescription had commenced before its passage, but was not then complete under the old law, created a bar in ten years only after its passage.—Henry v. Thorpe, 14 Ala. R. 103; Nickles v. Haskins, 15 *ib.* 619; Cox v. Davis, 17 *ib.* 714.

It is a familiar principle, that the decisions of the Supreme Court, giving a construction to statutes, become incorporated into the law itself, and constitute a part of it; and this is especially the case in the construction of statutes relating to real estate. Successive determinations make the law.—3 Atk. 762; 11 Wheaton 367; 2 Peters 18; 5 *ib.* 264; 2 Brock. 288.—The above cited decisions therefore, on the act of 1843, have become a part of the act, and a rule of property, "and ought not to be disturbed, except for very cogent reasons."—20 Johns. 721; 16 *ib.* 402; 8 Durn. & E. 504; 1 East 741; 7 Durn. & E. 419. Besides, these decisions have been suffered to remain, until the very moment when the act, by lapse of time, has had all its effect; when, by its repeal, it can only remain to regulate rights acquired or lost under it; and when a change of its construction, if made, could never operate on the future, but only on the past, to affect *vested rights*, and would be liable to all the objections that could arise from giving to the act a retroactive effect.

The construction heretofore placed on the act of 1843 is correct on principle. That act and the act of 1802 have the same general object, and cover the same field, to-wit: the limitation of actions for the recovery of lands. The terms of the later

act are even more general and comprehensive than those of the former; it provides a uniform limitation of *ten* years, instead of the old prescription of twenty or thirty years. Here, then, are two acts, passed at different times, relating to the same subject, but containing provisions repugnant to each other; and it follows, from the principle universally recognized from the earliest times, that the two acts cannot stand together, but the former is repealed by the latter. "Statutes introductive of a new law, penned in the affirmative, do always repeal former statutes concerning the same matter, as implying a negative."—Harcourt v. Fox, 1 Show. 520. For further illustrations of this rule, see Dwarris on Statutes 673; 3 B. & Ad. 818; 1 M. & W. 135; 8 Blackf. 581; 5 English 588; 3 McLean 212; 4 Wash. C. C. 691; 1 Iowa 338; 3 Howard's U. S. R. 635; 13 *ib*. 429; 3 Greenl. 22; 10 Pick. 37; 9 N. H. 59; 2 Bibb 96; 6 B. Mon. 146; 7 S. & M. 9; 1 Kelly's R. 32; 3 Dess. 135.—And the same doctrine has been recognized and acted on in this court.—Kinney v. Mallory, 3 Ala. 626; Cole v. Flournoy, 9 Ala. 402; Jordan v. The State, 15 Ala. 746; Hirschfelder v. The State, 18 Ala. 112; 8 Porter 434. But the act of 1843 is not merely an affirmative statute, introductory of a new law, implying a negative *ex vi termini;* it contains express *negative* words, thus indicating a clear intention to make it *exclusive* as well as *imperative*, and bringing it within this modification of the rule above laid down, that, "if a subsequent statute, contrary to a former act, have negative words, it shall be a repeal of the former act.—Dwarris 679; 7 B. & C. 12.

If, then, so much of the act of 1802 as relates to the subject is repealed, how is it to be regarded after such repeal? Does it wholly cease to operate at the moment of its repeal, or does it still affect a certain class of cases, and cease to operate as to others? An act of limitations is intended to bar the enforcement of a right, unless legally asserted within the time prescribed; and its effect is, in one case, the acquisition of a right of property by the possession of a thing during the time limited, and, in another case, the extinction of a right which is not legally enforced during the same prescribed time. No right of property can be acquired or extinguished by virtue of such an act, unless the whole time prescribed has elapsed without any interruption. The repealed statute, then, does not wholly cease

to operate at the moment of its repeal, but still governs all cases where the entire time prescribed by its terms as a bar had elapsed before its repeal, and may be invoked at all times to protect or discharge those affected by it. But in all cases where prescriptions had commenced, but were not completed at the time of repeal, the repealed law can have no effect; as to them, it wholly ceases to operate; for, if it was powerless to aid or protect before its repeal, much less could it have any such effect after its repeal. It is the well settled rule of the common law, that a repealed act must be considered, except as to transactions passed and closed, as if it had never existed.—Dwarris 676; 9 B. & C. 752; 7 Bing. 582. This doctrine has been recognized as established law, wherever the point has been raised in this country.—8 Blackf. 581; 7 Mass. 140; 17 *ib.* 240; 11 Pick. 350; 1 N. H. 51; 1 Watts 258; 5 Cranch 283; 3 Hals. 48; 7 Barr 174; and it has been recognized by this court, in 17 Ala. 828; 4 *ib.* 487; 14 *ib.* 435; 6 Porter 372; 1 Stewart 347.

If this, then, be the empire and limit of the repealed law, the new law must commence where the old one ceases, and must control and regulate all matters within its purview upon which the old law had ceased to operate; or, in other words, the new law must regulate all things within its purview, except such rights as were vested under the old law. A new statute of limitations, then, must govern all causes of action existing when it went into effect, and not then barred by the former act. This is not giving the statute a retro-active or retrospective effect. A statute retro-acts, when it returns to the past, and changes it to the prejudice of some one, by taking from him rights actually acquired or vested.—3 Dallas 391: 7 Johns. 593; 2 Gall. 139; 2 Cranch 272. *What, then, are vested rights?* Are prescriptions commenced under the old law, but not completed, vested rights, which the new act cannot regulate? A prescription commenced, but not completed, is neither a vested or acquired right, nor a right at all.—Vazeille on Prescriptions, 2 vol. 451 § 790; Troplong, 2 vol. 692; Theveneau 696; 24 Merlin's Repert. 95.

Statutes of limitation affect only the remedy, and not the right; and so far as rights have not been already acquired under them, they are subject, at all times, to be changed or modified by the legislative will.—2 Mass. 84; 3 Johns. 264; 2

Vermont 540; 13 East 439; 10 B. & C. 903; 2 Bing. N. C. 202, 209, 216; 5 Clark & Fin. 13, 17; 4 Watts & Serg. 218; 4 Humph. 14; 9 S. & M. 310; 1 Hill 325; 4 Wheaton 207; 3 Peters 280; 9 Howard 526; 8 Porter 84; 1 Ala. 312; Story on Con. of Laws, § § 576, 577, 578; 2 Kent's Com. 472.

But justice and sound policy indicate, that, whenever a prescription is shortened by statute, there should always be allowed, between its passage and the limit which it establishes, a sufficient time for those against whom it operates to prosecute their rights. Statutes of limitations are always prospective in their operation: they always loook to a future limit, but not exclusively to future causes of action; they apply to all causes of action pending, and not already barred when they go into effect, whether originating at that moment or previously, unless otherwise expressly provided. These views are sustained by the civilians, and by the following common law authorities.—3 Peters 289; 2 Denio 579, 585; 10 Wend. 363.

In applying statutes of limitations to prior causes of action, the time elapsed before the statute goes into effect cannot be counted as any part of the prescription: such causes of action only accrue, in the contemplation of the act, when it commences to operate on them, and consequently the prescription required must commence with the act, and from that moment run out entirely under it. A cause of action cannot accrue, in the contemplation of the act, before the act exists, nor before it goes into effect.—Lewis v. Lewis, 7 Howard 776; Ross v. Duval, 13 Peters 62. The case of Lewis v. Lewis, *supra*, overrules the decision in 3 McLean 568, which is relied on by plaintiff in error.

But, it is said, the legislature intended to shorten the time of limitations, and therefore a construction of the act which would, in many cases, prolong it, would be contrary to such intent, and clearly against the primary rule of interpretation. It is admitted that the intention was to limit all actions to *ten years after the passage* of the act, because this is the express language of the act; but not that any actions should be barred in less than ten years from its passage, for there is nothing in the language of the act to indicate such intent, and no necessity for a construction so repugnant to its plain terms. The intention must govern, but that intention must be discovered from the

words of the act, where they are plain and unambiguous.—Dwarris 694, 702; 6 B & C. 715; 7 *ib.* 560; Vattel 255 § 257. But the objection itself recoils on those who make it; for, they say, the proviso to the first section applies also to the second, and thus prolongs the prescription, to a certain extent, on prior causes of actions. It lies not, then, with the plaintiffs in error, to make this objection, unless they can give a construction to the act which will not present it.

The proviso to the first section applies only to that section. There was a necessity for its application to that section, to prevent a retro-active effect and a sudden extinguishment of all remedy in a large class of actions to which it would apply; but there was no necessity for its application to the second section, which took away no remedy, and interfered with no vested rights. Besides, the two sections are wholly separate and distinct in subject matter; there is no necessary connection between them; each may be considered a separate and distinct act.—Bridgman on Judgments 315.

GOLDTHWAITE, J.—Under the decisions of this court in Hallett & Walker v. Doe, 7 Ala. 332, and Doe v. Jones, 11 Ala. 63, and Kennedy v. Kennedy, 2 Ala. 571, Joseph P. Kennedy, by virtue of the deed from William E. Kennedy, obtained title to an undivided half of the premises sued for.—This title, at his death, descended to his heirs at law, who are the lessors of the plaintiff; and the only question really made upon the record is, as to the effect of the statute of limitations in divesting the heirs of their title thus acquired.

In this aspect of the case, the first question is, whether the proviso which is found in the first section of the act of 1843 (Clay's Dig. 329 § 92) applies to the whole act, or is to be confined to the section to which it is attached. As the natural and appropriate office of a proviso is to restrain or qualify some preceding matter, we think, upon sound principles of construction, it should be confined to what precedes, unless it is clear that it was intended to apply to subsequent matter. In the present case, we can perceive no good reason why the limitation of the proviso should be extended to the second section; on the contrary, the effect of such an application would be, to give to that section a partially retro-active operation, which, al-

though it is allowed, is not a construction favored by courts.—The whole argument of the plaintiff in error upon this point, is based upon the use of the word "act" in the proviso; and although this word, in its ordinary acceptation, would include the entire statute, it is not so definite in its meaning that it may not be applied to a complete and independent section, if found in connection with it. We think it more probable that the word "act" was used as the synonyme of "section," than that the proviso was intended to apply to subsequent matter. We do less violence to the usual meaning of the word in the one case, than to the objects of the proviso in the other. The case of Coxe v. Davis, 17 Ala. 714, supports the view we have taken, and although the decision upon this point may not have the force of an adjudication, we all concur that the correct construction was given to the proviso in that case, and that its application was properly confined to the first section.

The only remaining question is, whether that portion of the statute of limitations (Clay's Digest 327 § 83,) is repealed by the statute of 1843. (Clay's Digest 329 § 93.)

By the first of these acts it is provided, that "no person who has any right or title of entry unto any lands, shall make an entry thereon, but within twenty years after such right or title has accrued." The second section of the last act limits all actions for the recovery of lands to ten years after the accrual of the cause of action, but contains no repealing clause.

It is unquestionably true, that, although the law does not favor the repeal of statutes by implication, yet, if the provisions of two statutes are so inconsistent that they cannot both stand together, the law repeals the first.—Campbell v. Wyman, 2 Port. 219; Kinney v. Mallory, 3 Ala. 626. Are the provisions of the two statutes we are discussing so inconsistent that they cannot stand together? We have repeatedly held, that the act of 1843 was not retro-active in its operation, (Henry v. Thorpe, 14 Ala. 103; Doe v. Haskins, 15 Ala. 619; Coxe v. Davis, 17 Ala. 714;) and the correctness of these decisions upon this point is not questioned. The subject, therefore, on which the act of 1843 operates, can only be a possession which has continued ten years subsequent to its enactment. On what does the act of 1802 operate? The answer is, upon a possession of the period it prescribes, and which is not covered by the act of

1843. We say "not covered by the act of 1843," for the reason, that when the possession, which is required to operate as a bar by that act, becomes complete, it is then brought within, and of course governed by its provisions; but, until then, the last act cannot operate upon it. If a possession can exist under the first act, separately and independently of that which is required under the last, then, although both acts may relate to the same subject, the matter on which they operate is not the same, and the rule laid down by Judge Collier in Campbell v. Wyman, *supra*, applies: "that, although two statutes be seemingly repugnant, yet, if there be no clause of *non obstante* in the latter, they shall, if possible, have such construction as that the latter may not be a repeal of the former by implication."

Upon the application of this rule, it would seem to follow, necessarily, that the act of 1802 remains in force as to possessions commenced under it, until the possession is covered by the act of 1843. This construction results from the prospective operation of the last act, and is in harmony with the general principles of law, and the spirit of the English as well as the American decisions, (Wilkins. on Lim. 140 to 147; Cochran v. Spiller, Vern. & Scriv. 468; Eakin v. Rawle, 12 S. &. R. 330; Williamson v. Field, 2 Sanf. Ch. Rep. 533;) and we may also add, that it is in conformity with the doctrine of the civil law.—Delvincourt Code Civil 633; 2 Vazeille Traite des Prescriptions, Art. 789, 790.

A still stronger argument, however, in support of the conclusion to which we have arrived, is to be found in the intention of the legislature as deducible from the act of 1843. Upon this matter we think there can be no difference of opinion. The statute speaks for itself, and says, that the bar arising from adverse possession is to be diminished in one class of real actions to one fourth, in writs of right to one third, and in all other real actions to one half of the time which had previously been required; thus being, in effect, a legislative declaration, that the time which was necessary under the old law to effect a bar, was too long; and in the face of this declaration, we are called upon to sustain a construction directly the reverse of that which is indicated by the act, as the policy of the law—a construction which would, in many instances, have the effect of increasing the time required to complete a bar, and which, in extreme

cases, would have the singular effect of adding to the possession the same number of years which the legislature, in effect, declare ought to be taken from it. It would present a singular anomaly, not to say absurdity in legislation, for the law-maker to declare that the period of possession required to bar an outstanding title was too long, and at the same moment enact a statute which would increase that period. To give to the statute the construction insisted on, would not only be in violation of well settled legal principles, but directly subversive of the will of the legislature, and if adopted must tend materially to impair the confidence of the community in the soundness and practical good sense of legal distinctions.

We have elaborated our views as to the operation of these statutes, more than we should have done, for the reason, that it has been urged, that the question we have discussed is not an open one in this court—that a different construction was given to the act of 1843, in the case of Henry v. Thorpe, 14 Ala. 103, and that the construction there given was recognized and affirmed in the later cases of Doe v. Haskins, 15 Ala. 619, and Coxe v. Davis, 17 Ala. 716. If this be so, and the construction thus given was made under such circumstances as to give to these cases the force of adjudications upon the questions here presented, whatever may be our own views as to their correctness, we should feel bound, from a just regard to the rights of others, who may be supposed to have acquired titles under them, to adhere to the rule which they have established. The evils arising from a wrong decision, great as they may be, would, in our opinion, weigh but little, in comparison with the consequences which might ensue to the community from the establishment of a precedent, under which the most solemn adjudications of this court in relation to the titles of real property might be questioned and abrogated. The doctrine of the English courts is, to adhere to the authority of adjudged cases, "where they have been so clearly, so often, or so long established, as to create a practical rule of property, notwithstanding they may perceive the hardship, or not perceive the reasonableness of the rule".—1 Kent 478.

"The absurdity of Lord Lincoln's case," said Lord Mansfield, "is shocking; however, it is now law."—Doe v. Pott, Doug. 695. But we must be careful to confine this rule, as to

the authority of adjudged cases, to the points actually decided, and the true principles of the decision. In every court, if a case varies from the facts and circumstances of preceding authorities, the judge is at liberty to found a new decision on these circumstances, (Lord Eldon, 8 Dow. 112); and it has never been asserted, that we are aware of, by any court, that every thing which is said by the judge, in delivering his opinion, is to be taken as law, or that his argument, upon legal questions, not properly arising upon the facts of the case, is to be regarded with the deference due alone to the true principles on which the decision should rest.—Best, C. J., in Richardson v. Mellish, 2 Bing. 229. With these remarks, we proceed to an examination of the several cases which are relied upon by the defendant in error, to sustain the position that the act of 1802 is repealed by the act of 1843.

In Henry v. Thorpe, *supra*, which was a writ of right barred in thirty years under the ninth section of the act of 1802, the action was brought in 1845, and the adverse possession commenced in 1818. Collier, C. J., who delivered the opinion of the court, in stating the question presented, says: "We come now to consider the case with respect to the statute of limitations. The statute of thirty years had not completed a bar in 1845, when the present action was instituted, and the question is, whether that statute, in connection with the act of February, 1843, or the latter in itself, constitutes a bar. It is contended by the defendants that the acts of 1802 and 1843 must operate proportionally, and that, as five-sixths of the period of limitations prescribed by the former had elapsed before the latter was enacted, one sixth of the time prescribed by the act of 1843 being added, the bar would be perfect." The judge then proceeds, "We have not been able to find any decision of a court recognizing the common law, in which the time elapsed under a repealed statute of limitations has been taken into account, to help out the prescription of the new law, when the period required by the old enactment had not expired previous to its repeal. Such a doctrine is not supported by the civil law. The citations of the counsel for the plaintiff show, that civilians do not entirely concur in their opinions on this question; yet the majority of them, and the best reasoned discussions, maintain that it is competent to modify the terms of prescription at pleas-

ure, and where the prescription has not been completed when the law was changed, the past shall be effaced, and the substituted law shall determine the time that bars a recovery. It is certainly allowable, and perhaps would be altogether just, that effect should be given to the time past, whenever a change is made in the statute of limitations, so that the term may not be protracted; but, if no such provision is made by the new law, we cannot perceive by what authority the courts can give to both statutes a proportional operation. The latter, if not an express, will operate as an implied repeal of the former, and thus destroy its effect *in toto*." It is obvious from the statement of the case, that the question as to the repeal of the act of 1802 by that of 1843, was not presented upon the facts. The possession commenced in 1818; the action was brought in 1845; so that thirty years, the time required under the first act, had not then expired. The bar was not complete under the second act, because it had not then been passed ten years. The only question presented was, the one stated in the opinion of the court, which we have quoted. The decision was correct, for the reason, that the bar was complete under neither act, when the action was commenced. The question as to the repeal of the first statute does not appear to have been made by the counsel, nor did it properly arise upon the record; and the conclusion that such was the case, was simply stated by the judge by way of argument, and appears to have been based upon the analogies of what he wrongly conceived to be the doctrine of the civil law in relation to prescriptions.—Delvincourt and Vazeille, *supra*. The vice of the opinion is not in the result, but in the course of reasoning by which the result is arrived at. It is evident that this case cannot be regarded as an adjudication of the question.

In Doe v. Haskins, 15 Ala. 620, the time of the commencement of the action does not appear from the statement of the case in the reports; but we have looked into the record, and find that the action was brought in 1847. The defendant relied on possession under a bond for titles executed in 1836, coupled with the payment of the purchase money. His possession not being sufficient under the act of 1802, or under the act of 1843, unless the latter operated retrospectively, the question was simply as to the operation of that act. Collier, C. J., rests the case on Thorpe v. Henry, *supra*. Here, also, the decision was correct;

but the question as to the repeal of the act of 1802 was not involved, and the reiteration of a portion of the opinion in the former case does not render it authoritative as a precedent, except as to the point actually decided. The last case, that of Coxe v. Davis, 17 Ala. 714, does not present the question at all, and the decision, at the most, goes no further than to sustain the prospective operation of the act of 1843.

We recur again to the question, has the point under discussion been adjudicated in either of the three cases which we have examined? We have shown, that, in neither of them, was the point directly presented, nor was its decision incidentally involved, or required to be made in order to reach the point presented. In neither of the cases had the period of possession prescribed by the act of 1802 been consummated. Under such circumstances, we cannot regard these adjudications as conclusive of the question presented upon the present record. We must regard it as before us for the first time, and give to the expressions in the opinions relied on only such weight as is properly due to them upon principle and authority.

Upon the fullest consideration of the question, we are satisfied that the doctrine argumentatively asserted in Thorpe v. Henry, *supra*, that a change of the period of prescription, *of itself*, effaces the time which has passed under the old law, if not sufficient to perfect the title, and that prescriptions commenced under the old law, in all cases in which they were not complete at the time of the change, must be determined by the new law, cannot be sustained. We hold that the statute of 1802 is not repealed by the act of 1843, and that prescriptions commenced under the first act are governed by it, until they fall with the operation of the last; and the consequence is, the possession of the defendants below for more than twenty years before the commencement of the action, furnished a full defence as to Oscar Kennedy.

The result is, that upon the case made by the record, the plaintiff was entitled to recover, on the separate demises laid in the declaration from Charles G. Shrieve and Mary his wife, and Ella Walker, one undivided sixth of the lot described in the consent rule, on each demise; the rule being, that where the statute runs against one tenant in common or co-parcener, its operation as to him does not affect the co-tenants who are within

the saving of the statute, upon separate demises by them.—Roe v. Rawls, 2 Taunt. 441; Lewis v. Barksdale, 2 Brock. 426; Jackson v. Sample, 1 John. Cases, 231; Doolittle v. Blakely, 4 Day 265; Sanford v. Button, *ib.* 310; Cullen v. Motzen, 13 S. & R. 350. The court, therefore, erred in giving judgment for the whole of said lot, and its judgment must be reversed, and, under the rule established in Edmonds v. Edmonds, 1 Ala. 401, the cause must be remanded.

BURNS *vs.* TAYLOR ET AL.

1. A defendant, who is a formal party to a bill as husband of one of the heirs at law of an insolvent decedent, is a competent witness for his co-defendant, especially when he testifies against his own interest.
2. The correctness of the rule questioned, which is laid down in Holman's Heirs v. Bank of Norfolk, 12 Ala. 405, that where a defendant who appears from the face of the proceedings to have no interest makes a long and formal answer, setting up as a defence to the bill matters which do not properly concern him, and thereby subjecting himself to a liability for costs, he is rendered incompetent as a witness for another defendant.
3. A vendor who takes no independent security for the payment of the purchase money, has a lien on the lands for its payment, as against the vendee and all claiming under him with notice of the lien; and this principle equally applies to exchanges of lands, and whether the parties execute conveyances or bonds for titles only.
4. When the only condition of a bond for title is that titles shall be made as soon as a patent is obtained from the Government, the presumption from its face is that the purchase money has been paid, and it is no notice to an assignee of an obligee that the purchase money is unpaid.
5. The fact that land is in the possession of a third person, is sufficient to put a purchaser upon inquiry, and to preserve a lien against him if he purchases without inquiry.
6. If a person in possession of land, upon inquiry by one who is about to purchase it from another, relative to the title, advises him to purchase, and assures him that there will be no difficulty about the title if he does, and afterwards delivers up the possession to the purchaser's agent, his acts amount to an abandonment or waiver of a vendor's lien which he held rgainst the person from whom the purchaser bought.
7. And although, when afterwards applied to by the purchaser for an assignment of a title bond held by him, he refuses to make the assignment, until assured by the purchaser that it will not impair his lien, and makes the assignment upon this understanding, this does not place him in any better or worse position, as his lien was already lost by his previous conduct,

Error to the Chancery Court of Tallapoosa.

Heard before the Hon. W. W. Mason.

Alexander Burns filed his bill of complaint against the defendants in error, alleging that he held two title bonds from one Salmon Washburn, for certain lands situated in Tallapoosa, copies of which bonds, dated in 1835 and 1836, are annexed as exhibits to his bill; that Job Taylor Jr. also held said Washburn's title bond, for certain other lands, and that he and complainant exchanged lands; that the exchange was consummated simply by an exchange of Washburn's title bonds; that complainant's lands were estimated to be more valuable than those of Taylor, and that Taylor executed to complainant his notes for $1400, the estimated difference; that Taylor went into possession of the lands which he obtained by the exchange, but complainant has never been able to obtain possession of those which Taylor contracted to give in exchange; that Washburn, on account of said Taylor's failure to comply with the terms of the sale, by which he had procured the said Washburn's title bond, had sold the land to other persons, so that complainant, in fact, has received no lands whatever in exchange for his; that some time afterwards, said Taylor made an assignment of all his lands, or the greater part of them, to his uncle, one Job Taylor, Sr., a resident citizen of Georgia, and among them the lands procured in said exchange from complainant, and had delivered to said Job Taylor Sr. Washburn's title bond made to complainant; that aftewards, to-wit: in 1840, said Job Sr., by his agent, presented said title bond to complainant, and requested him to assign it in writing, so as to enable him to obtain titles to the lands therein mentioned; that complainant at first refused, having become suspicious about the lands for which he had exchanged, and apprehending that, if he did so, he might lose his vendor's lien on the lands which he had given in exchange, and informed said agent of all the circumstances relative to said exchange; that said agent then assured him that his lien could not and should not be affected by a transfer in writing, and that the only object was to facilitate the procurement of titles; that under this assurance complainant made a written transfer of said title bond to said Job Taylor Sr., and that no valuable consideration, or any other consideration than that set forth, ever

passed for the same, and that said Job Sr. is an assignee with full notice of complainant's equities.

The bill further alleges, that said exchange with Job Taylor Jr. was by parol, no deed or memorandum in writing existing, except the title bonds which were exchanged; that complainant has lost or mislaid the title bond which he received on said exchange; that after the said written assignment by complainant, said Job Sr. procured a deed from Washburn, and now holds the legal title to said lands; that suits have been brought on all the notes given by said Job Jr. on said exchange, and judgments recovered thereon against him; that one of said judgments, recovered in the name of complainant for the use of D. S. Robertson, for $850, is the property of complainant, and has never been paid; that the other two judgments were recovered in the name of complainant's endorsees, Henry Starr and John Faulks, and executions thereon being returned "no property found," complainant had afterwards been compelled to pay them by suit on his endorsements; that said Job Jr. has wholly failed and neglected to pay said sum of $1400, which he agreed to pay; that the assignment by Job Jr. to Job Sr. was wholly without consideration, and was intended to hinder complainant in asserting his rights; that, in equity, said Job Sr. and his vendees hold said lands in trust for complainant; that said Job Jr. has died insolvent, and said Job Sr. is in possession of the lands, enjoying the rents and profits.

The bill prays that said Job Sr. may be decreed to convey said lands to complainant, or that they may be subjected to the payment of the $1400 and interest; the prayer for general relief is also added.

Washburn's two title bonds to complainant are made exhibits to the bill. One of them is dated December 11, 1836, and bears this endorsement: "I endorse the within bond to Job Taylor Sr. for a valuable consideration, October 1, 1840." (Signed) "A. Burns." The other is dated November 20, 1835, and bears an endorsement in the same words.

Job Taylor Sr. filed his answer to the bill. Its material allegations are as follows: respondent knows nothing about the alleged exchange of lands, or the agreement of Job Jr. to pay $1400 difference; Job Jr. was extensively engaged, about 1839, and previously, in buying Indian lands on speculation; respon-

dent loaned him money for that purpose, and he thus fell in debt to respondent in 1839 in the sum of $23,673 98; respondent purchased from him the land in controversy at the price of $4000, and also sundry other tracts, a schedule of which, with the prices, &c., is annexed to the answer. He avers, that, before making the purchase, he called on complainant, and informed him that he had come to look at the lands, with a view of purchasing them if he liked them; that he inquired of complainant about the titles; that complainant encouraged him to purchase them, and told him there would be no difficulty about the titles if he did so; that relying on this assurance of complainant, respondent took the bond for titles which Job Jr. held, and paid him $4000 for the land; that $600 of this sum was paid in cash, and the balance of $3400 was credited on a note which respondent held on said Job Jr.; that in May, 1840, complainant informed respondent that he was going to leave said lands, and advised respondent to get some one to take possession for him, and willingly surrendered the possession to respondent's lessee.

He further avers, that, in 1839, 1840 and 1841, he purchased lands from said Job Jr. to the extent of about $24,273 98, and also paid out considerable sums to others, to procure titles to the lands so purchased, and he appends to his answer a schedule of the lands so purchased; that these lands were all purchased at a full and fair consideration, and *bona fide;* that John Rowe acted as respondent's agent in the purchase of some of them; that Job Jr. was largely in debt. Respondent knows nothing respecting complainant's failure to obtain the lands for which he exchanged, and knows nothing about that exchange; denies that he ever took from Job Jr., when he purchased the lands, the title bonds executed by Washburn to complainant; avers that he "never handled or saw such a bond, to his best recollection," and that the bond which he received from Job Jr. was a bond for titles made by complainant to him, Job Jr.; that, some time in 1840, he handed this bond to one Simeon B. Taylor, and requested him to take it to complainant, and get him to execute titles to said lands according to its conditions; but he denies that said Simeon was his agent for any other purpose, and avers that any assurance given by said Simeon, about complainant's retaining a lien on the land, was wholly unauthorized, and not

binding on respondent; that said Simeon, on his return, brought respondent a deed to said lands from Washburn. Respondent does not know how the assignments on Washburn's bonds came to be made, but he supposes that complainant, to avoid making titles himself, took in his own bond, and assigned Washburn's in its stead, that the title might come direct from Washburn; he appends, as an exhibit to his answer, a copy of the title bond from complainant to Job Taylor Jr., for the lands in controversy, dated November 13, 1839, and assigned by Job Jr. to respondent on the 16th November, 1839; denies that he had any notice of any lien, equity or incumbrance of complainant's, on the said lands, at the time he purchased; was induced to purchase, partly, by complainant's assurance that there would be no difficulty about the title; denies all knowledge of the notes alleged to have been given by Job Jr. to complainant, and calls for proof; admits that he has Washburn's deed for the lands, made as aforesaid, dated December 1, 1840, and made an exhibit to the answer; admits that Job Jr. died insolvent.

After the coming in of this answer, complainant asked and obtained leave to amend his bill. This amendment changes the allegation relative to the exchange of lands, and asserts that said exchange was made by the execution of new title bonds from complainant to Job Jr., and from the latter to complainant; the title bond from complainant to Job Jr., which was made an exhibit to the answer, is now made an exhibit to the amended bill; the value of the lands which complainant exchanged is set down at $8000, and the value of those for which he exchanged at $3500; and it is alleged that the balance of $4500 was to be paid in money, and that none of it has been paid. The heirs at law of Job Jr. are made parties defendants to the bill, among whom are John Rowe and his wife, who was a sister of said Job Jr.

Taylor's answer to the amended bill does not materially vary from his first answer. He demurs to the bill, for want of equity, and for want of proper parties.

Orders of publication were made against the non-resident defendants, and guardians *ad litem* appointed for the minors; and decrees *pro confesso* were taken against those defendants who failed to answer.

John Rowe filed an answer, in which, among other matters not

material. he states that, in the latter part of 1840 or the first of 1841, he went to take possession of the lands in controversy as agent of Job Taylor Jr., and did take possession of them as such, and rented them to one Allen Harden; that complainant, at this time, made no objection to his taking possession, and did not assert any lien or claim upon them, but, on the contrary, informed respondent that he had persuaded Job Jr. to buy them, and was gratified that he had bought them, and he assisted respondent to rent them out; that, at this time, complainant made no claim, equitable or otherwise, to said lands, and said nothing about any failure to pay on the part of Job Jr.

John Rowe was examined as a witness on the part of the defendants, by order of the court. He testifies, that he acted as agent for Job Taylor Jr. in 1840 and 1841, in relation to his lands in Tallapoosa, renting them out, &c.; that he called on complainant, and received from him possession of the lands in controversy; that complainant readily assisted him to rent them out; that complainant told him, in a conversation had between them in the fall of 1840, that he had persuaded Job Jr. to buy these lands, at about $4000, and that he told said Job, in reply to a question from the latter, previous to his purchase, that the title would be good; that he has frequently heard Job Jr. and Job Sr. converse about their business, and has heard the former frequently admit that he owed the latter about $24000; that this amount has been paid by him to said Job Sr. in lands, part of which were the lands in controversy.

Washburn was examined as a witness on the part of the complainant. He testifies, that in November, 1839, he gave to Job Taylor Jr. a bond for titles to the lands mentioned in the bill, and also a bond for titles to complainant, for other lands, as alleged in the bill; that for the lands sold to Taylor, he took his notes for the sum of from $2500 to $2800; that these notes were not paid, and he therefore rescinded the contract, and sold the lands to other persons; that he has frequently heard complainant and said Taylor Jr. both speak of a sale or exchange of the lands mentioned in the bill, which was before the rescission of his contract with said Taylor, and a short time after he had executed his title bond to said Taylor; that he knows nothing, of his own knowledge, about said contract or swap; that he does not know whether complainant had any knowledge of his

rescission of his contract with said Taylor; that he made a deed to Job Taylor Sr. on being presented, through the latter's agent, with his title bond to complainant.

One Tower, a witness examined on behalf of complainant, proves the exchange of lands and execution of title bonds respectively, between complainant and said Job Taylor Jr.; as alleged in the bill; that the value put on said Taylor's land was $3500, and the penalty of his bond $7000; that the penalty of the bond given by complainant was $16000; that both bonds were dated November 13, 1839; and that notes were executed by said Taylor to complainant, but the number or amount witness does not know.

Henry Starr proves that complainant transferred to him a note made by said Job Taylor Jr., dated January 12, 1840, and payable one day after date, for $189, which, Taylor admitted, was given for land to which Washburn held title; that he recovered a judgment on this note, for $199,25, which judgment now belongs to complainant, who has paid witness.

John Faulks proves that complainant transferred to him a note on Job Taylor Jr. for $311, dated January 12, 1840, and payable one day after date, on which he recovered judgment for $325; that said Job Taylor Jr. told him this note was given in part payment of the difference in exchange of lands with complainant; that he, Taylor, was to give $1500 difference, and this note was part of it; that complainant paid this judgment in 1841.

One Reese, a witness for complainant, proves that complainant placed in his hands, as an attorney, a note for $800 on Job Taylor Jr., dated Nov. 13, 1839, payable Dec. 25, 1840, to complainant, on which he recovered a judgment in the name of the payee, for the use of Robertson; that Taylor admitted to witness that this note was given for land; that the note was placed in witness' hands by complainant, as collateral security for a note on one Ramage due to Robertson, on which complainant was sued as his surety; that Robertson's debt was collected out of the principal debtor, and the judgment now belongs to complainant. It was admitted that about $400 had been collected under executions issued on these judgments, by sale of lands or other property belonging to said Taylor, in 1843.

One Dillard, another witness for complainant, proves that he

was present at an interview in Dadeville, in the latter part of 1840, between complainant, Job Taylor Jr., and Simeon B. Taylor, the latter representing himself to be the agent of Job Taylor Sr.; that the said Simeon wished to procure from complainant an assignment of Washburn's title bonds; that complainant objected to assigning them, because he feared it would impair his lien for the purchase money of the land, but was assured by said Simeon and Job Taylor Jr. that it could not; that upon complainant's declaring that he would not be considered as giving up any lien or legal advantage, they both consented that the matter should be so considered, and with this understanding complainant assigned Washburn's bonds to Job Taylor Sr.

At the hearing, the Chancellor dismissed the bill, with costs.

The errors assigned are:

1. In pronouncing the decree shown by the record;

2. In pronouncing a decree dismissing complainant's bill;

3. In admitting and considering the testimony of the defendant, John Rowe.

Leftwich and Watts, Judge & Jackson, for plaintiffs in error:

I. 1. That a vendor of land has a lien in equity upon the land, for the payment of the unpaid purchase money, against the vendee, or purchasers from him with notice, is a proposition too well established to require citations of authority to support it.

2. The principle upon which this lien is established, is, that a person who has gotten the estate of another, ought not in conscience, as between them, to be allowed to keep it, and not to pay the full consideration money.—2 Story's Eq. Jur. 1219.

3. This principle applies with full force to the facts presented by the case at bar.—Bradley v. Bosley, 1 Barb. Ch. Rep. 125.

4. Whenever it is contended that this lien has been intentionally displaced or waived, the burden of proof to show it is on the purchaser; and if. under all the circumstances, it remains in doubt, then the lien attaches.—2 Story's Eq. Jur. § 1224.

5. And a person who holds merely a title bond for the conveyance of land, and sells the land and assigns the title bond, as was done in the case at bar, retains a lien on the land for the pay-

ment of the purchase money, in the same manner, and to the same extent, as if he had conveyed the land by deed.—Wiseman's Heirs v. Reid, 7 J. J. Marsh. 249.

II. 1. In this case, it is contended that this equitable lien cannot be enforced, because it is said Job Taylor Sr. is a subsequent purchaser of the lands for a valuable consideration without notice; and that he, in fact, purchased under a representation from Burns, that the title would be good.

2. This being the defence, the burden of proof rests upon Job Taylor to show that he paid a full and valuable consideration; this proof has not been made by him.

3. There was a witness to the transaction, (Abner Sims,) but he was not examined. He having been withheld, the presumption is, that if he had been examined his testimony would have been against the defendant.

4. Failing to call this witness, defendants relies alone upon the allegations of his answer; are they, upon this point, responsive, so as to be evidence? One allegation is, that Job Taylor Jr. was indebted to him in a large sum, and that $3400 00 of the purchase money was paid by placing a credit for this amount upon said indebtedness. This is not responsive, and this indebtedness and credit should have been proved.—Cummins v. McCullough, 5 Ala. 324; Carpenter v. Devon, 6 Ala. 718; Manning v. Manning, 8 Ala. 138; Dunn v. Dunn, 8 Ala. 784.

5. And the statement of the answer, that the remaining six hundred dollars of the purchase money was paid in cash, is very inconsistent and unreasonable, if it be true, as stated, that Job Taylor Jr. was indebted to Job Taylor Sr. at the time, in more than twenty thousand dollars, and that the object of the purchase was to settle in part this debt.

6. The answer, too, bears other suspicious marks upon its face; it strongly indicates that the two Taylors were jointly interested in all the land purchases of Job Taylor Jr. in Alabama, or that Job Taylor Sr. was a general cloak to cover the land-titles of the former.

7. But, conceding that it is sufficiently shown that a full and valuable consideration was paid by Job Taylor Sr. to Job Taylor Jr., then the question arises, was he a purchaser with, or without notice?

8. Job Taylor Jr. had no titles to the land, but only a bond

for titles; and the lien of a vendor for unpaid purchase money will be enforced, even against a purchaser without notice from the vendee, who only holds a bond for title.—10 Yerger 335.

9. Because the purchaser of an equitable interest purchases at his peril, and acquires the property burdened with every prior equity charged upon it.—7 Cranch 48.

10. The complainant, too, was at the time in the possession of the lands; and when a party purchases land in the possession of a third person, he is affected with all the equitable rights binding on the vendor, and he cannot set up the want of notice to protect himself.—Brewer & Brewer v. Logan, 19 Ala. 481.

11. But did Job Taylor, Sr. purchase in consequence of the representation made to him by complainant, that the title would be good? Such is averred to be the the fact in the answer, but it is not true, nor is it proved by legal evidence; and this averment of the answer is not responsive, so as to make it evidence.—Cummins v. McCullough, 5 Ala. 324; Carpenter v. Devon, 6 Ala. 718; Dunn v. Dunn, 8 Ala. 784.

12. This averment, too, is inconsistent and unreasonable, when we see from the answer itself, that defendant purchased of Job Taylor Jr., or pretended so to do, at other times, all sorts of titles and claims to lands, as well as lands to which there were no titles.

13. Is this averment of the answer sustained by legal proof? John Rowe is the only witness who was offered to sustain it, and he was an interested witness, and incompetent to testify, and his testimony should have been suppressed or rejected. As a defendant, he answered the bill, engaged actively in the defence of the suit, and thereby incurred a liability for costs, and rendered himself incompetent as a witness.—Holman's Heirs v. Bank of Norfolk, 12 Ala. 369.

14. But it is said Rowe was the agent of Job Taylor Sr., and that an agent is an exception to the general rule, and may testify, though he has an interest in the event of the suit. We answer: 1st. There is no proof of his agency. The answer averring that he was such agent, is not responsive to the bill, and is therefore not evidence; and Rowe himself being *prima facie* incompetent when he was examined, was of course incompetent to prove a fact, to render himself competent. 2nd. If it be proved that he was such agent, still he was incompetent, for

he was interested in the event of the suit, independently of his acts as agent.—McCall v. Sinclair, 14 Ala. 764.

15. Admitting, however, that this averment of the answer is sustained by legal proof, and the complainant is not affected by it; for the assurance that the title to the land was good, was not inconsistent with the equitable lien of complainant being retained; no reference or allusion was made to this lien, which it was well known existed, but the title only was the subject of inquiry. If it had been intended to embrace this lien, it would have been specially mentioned.

16. The delivery of possession by complainant to Job Taylor Sr. was not a waiver of his lien.—Greenup v. Strong, 1 Bibb 590; Taylor v. Alloway, 3 Litt. 216.

17. Admitting that defendant had no notice, actual or constructive, at the time he purchased from Job Taylor Jr., yet, if at any time before the execution of the conveyance he received notice, he is bound by it.—1 Munf. 38; 2 *ib.* 38; 3 Hen. & Munf. 316.

18. He did receive notice before the execution of the conveyance; for Simeon Taylor, his agent to procure the conveyance, was expressly told, when Washburn's bonds for title were assigned, that the lien would be retained; and this notification to the agent was equivalent to notice to the principal, and the principal is bound by it.

III. 1. But conceding that defendant was a purchaser for a full and valuable consideration, without notice, actual or constructive, express or implied, and that he purchased on a representation by complainant, that the title would be good, and still the lien must be enforced in this case; for, at the time of the assignment by complainant of the bonds of Washburn to defendant, it was expressly stipulated by complainant, as a condition precedent, and acquiesced in by the agent of defendant, that the lien of complainant was not to be thereby divested or impaired.

2. But defendant, in admitting the agency of Simeon Taylor to procure titles for him, denies that he had any authority to make such consent, and insists that he is not bound thereby.

3. This cannot avail defendant, for it is well established, that, if an agent transcends his authority, his acts are yet binding on his principal, if they are ratified; and acquiescence after

a knowledge of the acts of the agent is a ratification; and whatever is known to an agent, is, in contemplation of law, known to the principal, and the latter cannot aver his ignorance thereof.—Hough v. Richardson *et al.*, 3 Story 659.

4. In this case, if defendant intended to repudiate the act of his agent in procuring the title to said land, he should have returned, or offered to return the title; by holding on to it, and claiming the land under it as he does, he ratifies the terms under which his agent procured it; he cannot assault said transaction of his agent with one hand, and shield it with the other; but he must accept or reject it *in toto*.—Daggett v. Emerson, 3 Story 700.

IV. Can a valid objection be urged to proof being made by *parol*, of the understanding between complainant and the agent of defendant, that the equitable lien of complainant should continue upon the land, notwithstanding complainant assigned the bonds of Washburn for title? We contend not, for this is proof merely of the consideration of the transfer; and in equity either party, even to a deed, may aver and prove against the other, or against a purchaser with notice, the true consideration on which the deed was founded, though a different consideration be mentioned therein.—4 Hen. & Munf. 118. Besides, no trust was, by said act, created by complainant; though a trust may be created by parol; complainant only stipulated for the preservation of an existing right, or that an existing right should not be impaired by the act of assignment.

V. 1. As to the objection that the endorsees of the notes given for a portion of the purchase money should have been made parties to the bill, we say, that that cannot be insisted upon in this court, the record not showing that it was acted upon in the court below; had it been acted upon below, and the objection sustained, complainant would have had the right to amend; if it is acted upon in this court for the first time, and is decided adversely to complainant, he is denied this undoubted right.

2. But we insist that said persons were not necessary parties; for the bill avers they had no interest whatever in the judgments on said notes, at the date of the filing of the bill; and the proof in the record sustains this allegation.

VI. It is insisted that the notes alleged to have been given for the purchase money are not identified. Whether this be so

or not, is immaterial, if this court can perceive that any portion of the purchase money remains unpaid. The amount remaining unpaid, if any, can properly be ascertained on a reference to the master to take an account between the parties, and report thereon.

J. E. Belser and J. Falkner, *contra :*

1. It is, at least, doubtful whether the complainant has any lien on the land. The record shows a barter between the parties, and that a lien was never intended to be reserved on the lands exchanged on either side.—White v. Knapp, 8 Paige 173; 1 Barbour 125; Johns. Ch. 308; 2 Green's Ch. 397.

2. The defendant Taylor is a *bona fide* purchaser, without notice, and this is sufficient to dispose of the lien if it ever existed; and Taylor having shown himself a purchaser, it was incumbent on the complainant to show that he had notice of his lien, at the time of his purchase.—7 Wheaton's R. 46; 1 Dev. & Bat. Ch. 333; Mart. & Yer. 89; 5 Hump. 569; 2 Mis. 110. Notice of the lien cannot be inferred from relationship and near connection.—9 Ala. 705.

3. Rowe was a competent witness for the defendant Taylor. He was an agent, and nothing more than a formal party.—Bean v. Pearsall, 12 Ala. 592; Colgin v. Redman, 20 *ib.* 650.

4. The defence made by Rowe was not such as brings him within the principles of the following cases.—Holman's Heirs v. Bank of Norfolk, 12 Ala. 406; Markan v. Smyth, 11 Price 126.

5. If Rowe is a competent witness, the complainant is clearly estopped from asserting any lien that he had on the lands claimed adversely to him, under the circumstances disclosed.—McCrary v. Remson, 19 Ala. 431; Bean v. Welch, 17 Ala. 770; 7 Bing. 156; 7 Wend. 401; 3 Hill 215; 17 Ala. 681.

6. But, whether Rowe's evidence is received or not, the decree of the Chancellor is correct, and the estoppel is established by other independent proof. It is also doubtful whether the proof shows that the lands were given for the notes spoken of, or for either of said notes.

7. Taylor's agency must first be proved, before his acts are binding on the principal. The agent is a competent witness to prove the agency. The extent of his agency must also be

proved, and nothing done out of it is binding or conclusive.—Scarborough v. Reynolds, 12 Ala. 252; Bean v. Pearsall, *ib.* 592.

8. The declarations of Job Taylor Jr., after his sale to Job Taylor Sr., going to show that the notes were given for the lands, are not admissible, and without them the court cannot conclude that the notes were given for the lands.—Lee v. Hamilton, 3 Ala. 533.

9. The plaintiffs in the judgments, on which the lien is asserted, are indispensable parties. This is stated in the demurrer, and is of itself sufficient to dismiss the bill. If, after the want of proper parties is objected to, the complainant neglects or refuses to make them, the bill may be dismissed without prejudice.—Gayle v. Singleton, 8 Porter 270; Goodman v. Benham, 16 *ib.* 625.

10. The object in making Rowe a defendant was, to prevent him from being a witness. A disclaimer by him would not have satisfied the complainant's demands.

11. Does the assignment of the bond by Burns assign the lien, if it exists at all?

PHELAN, J.—It is objected that the testimony of John Rowe, in behalf of his co-defendant, Job Taylor Sr., should not have been received. We see no good ground for the objection. He was only a formal party, as husband of one of the sisters of Job Taylor Jr., who was made a party defendant as heir at law of her brother, the object of the bill being to divest the title to lands in which he once had an interest. The witness is called to support the title of Job Taylor Sr. to the lands in question, and is, therefore, called to testify against his interest as husband to one of the heirs of Job Taylor Jr., under any aspect of the case. Even if this were not so, there was no interest which would disqualify him; for both the bill and answer show that Job Taylor Jr. died wholly insolvent.

But, it is said, he took so active a part in the defence, that he made himself liable for costs, and that this will render him incompetent as a witness. When a party defendant to a bill, who, from the face of the proceedings, would appear to have no real interest, makes a long and formal answer, and sets up matters that do not properly concern him as a defence to the bill,

he raises a strong suspicion that he is, in fact, interested in the event of the suit, although that interest may not appear; and courts have sometimes held that the testimony of such a witness may be rejected, and place it upon the ground, that he thereby makes himself liable for costs, if the case goes for the complainant. We find the rule so stated in the opinion of the court, in the case of The Heirs of Holman v. The Bank of Norfolk, 12 Ala. 405. But, in that case, there was no necessity so to decide, for the party defendant, who was made a witness, was shown to have an interest other than that which respected the costs.

We hesitate to affirm the correctness of any such rule. The imposition of costs in chancery goes by no fixed law. The chancellor makes the law as respects costs for each case, according to its own peculiar features and circumstances. If, then, I have an interest in the testimony of a witness, whom the complainant chooses by his bill to make a co-defendant with me, where is the justice in holding that, if my co-defendant chooses, without any participation of mine, to make himself meddlesome in a defence that does not concern him, I shall suffer the loss of my testimony, because the chancellor may impose costs upon him? At common law, my witness cannot, without my consent, acquire by his own act such an interest as will deprive me of his testimony. But by this rule, if my witness is made, at the option of the other side, a party defendant with me in chancery, and through ignorance or negligence, or even through secret hostility to me, makes an active defence to the bill, he will be incompetent to testify for me, because by his own act he has subjected himself to the payment of some part of the costs. But it is in the chancellor's discretion, after all. His testifying need not save him, and cannot, unless the chancellor sees proper. He may decree for me, and, so far as justice warrants, put the costs where he pleases; a portion of it on my meddlesome co-defendant as soon as any other. Now, the interest which disqualifies must be a direct and certain interest in the event of the suit, or in the record; and this is to be tested, ordinarily, by the state of the case when the suit is commenced; for, as Chancellor Kent says, in Woodhull v. Rumsey, 3 John. Cases, 234: "The interest, in order to exclude the witness, must not have arisen after the fact to which he is called to testify happened, and by his own

act; because, in that case, it would be in the power of the witness, and even of the adverse party, to deprive the person wanting his testimony of the benefit of it." See, also, Colgin v. Redman, 20 Ala. 650.

We proceed next to the consideration of the questions which relate to the vendor's *lien*, which Burns claims to hold on these lands, as against Job Taylor Sr.

The facts are these: Burns and Job Taylor Jr. exchanged lands on the 13th November, 1839, and executed to each other respectively bonds for title of that date. They contained on their face no other condition than that the parties should make title as soon as patents were obtained from the United States. Nothing was said about the payment of purchase money as a condition to making title. Both then held title bonds from one Washburn for their respective tracts. On the 16th Nov. 1839, the defendant, Job Taylor Sr., made a purchase from Job Jr. of the lands he got from Burns, and took an assignment of the bond from Burns to said Job Jr. Before he purchased of Job Jr., Job Sr. made inquiries of Burns, who was then on the land, about the titles, if he should purchase of Job Jr., and was told by Burns that there would be no difficulty about the title, and advised by Burns to make the purchase. He did purchase, and took an assignment of Burns' bond, 16th November, 1839, as aforesaid; and the proof in the cause goes to establish the fact, that he paid a full consideration, and purchased in good faith of Job Jr., who then owed him a large amount for money loaned to carry on speculations in Indian lands.

On the exchange between Job Jr. and Burns, the latter was to receive $1400 as difference in the value of the tracts, and Job Jr. made his notes for about that sum, which were afterwards put in suit, but have never been paid, and are now the property of Burns. After the exchange between Job Jr. and Burns, the former rescinded his contract with Washburn for the purchase of the lands he contracted to convey to Burns, and Washburn sold them to other persons, and Burns never came into possession of them.

In the fall of 1840, one Simeon Taylor, as agent of Job Taylor Sr. to get a deed, called upon Burns, having then in his possession the title bond from Burns, which Job Jr. had assigned to Job Sr., 16th November, 1839, (Job Jr. was in company,)

and said Simeon Taylor requested Burns to assign to Job Sr. the bonds he held from Washburn. This he at first refused to do, saying he would probably thereby impair his *lien* for the purchase money; but, upon being assured both by Simeon Taylor and Job Jr. that his assignment of Washburn's bond could not have that effect, and upon Simeon Taylor's agreeing to take the assignment with the understanding that no *lien* existing should be impaired by it, Burns made to Job Taylor Sr. an assignment in writing of Washburn's bond to him for the lands which he let Job Jr. have in the exchange, and Washburn afterwards made a deed to Job Taylor Sr.

After the purchase by Job Sr., and before his assignment of Washburn's bonds, Burns had delivered possession of the lands to the agent of Job Sr., and assisted him to rent them out, saying nothing at the time of a *lien* that he claimed for unpaid purchase money, or that he had not received possession of the lands which he was to get in exchange.

On this state of facts two questions arise: 1. Did Burns hold a vendor's *lien* for the purchase money, after his exchange of lands, as aforesaid, with Job Taylor Jr.? 2. If so, has he done anything to forfeit that *lien*, so far as Job Taylor Sr. is concerned?

By the law as settled in this State, a vendor of land, who takes no independent security for the payment of the purchase money, holds a *lien* upon the land for the purchase money, against the vendee and all claiming under him with notice of the *lien;* and this, whether he executes a conveyance, or only gives a bond to make title.—Haley v. Bennett, 5 Porter 452. This *lien* is considered as an equitable mortgage, and there is nothing to distinguish an exchange of lands, so far as respects the application of this principle of *lien* for the purchase money, from a sale of lands.—Bradley v. Bosley, 1 Barb. Ch. 125. We think it clear that Burns had a *lien* on the lands he let Job Taylor Jr. have in exchange, to the full extent of the purchase money, made up of the value of the lands he was to get in exchange, which he never obtained, and the balance of $1400 for which Job Jr. gave his notes, which he never paid.

2. Has he done anything to forfeit this *lien* as against Job Taylor Sr.? We think he has. In the first place, it is to be remarked, that the bond which Burns gave to Job Taylor Jr.

contained no other condition than this, that titles should be made as soon as patents were obtained from the United States. Nothing is said about the payment of purchase money, as a condition precedent to the obligation to make title. From the face of such a bond as this, the presumption is, that the purchase money had been paid. It would be no more warning to a purchaser from the holder of such a bond that the purchase money was still due to the obligor, than would be a deed for the land in the hands of such holder containing the common acknowledgment that the consideration had been paid. The consideration for this bond, namely, the payment of the purchase money for the land, in the absence of words in the condition of the bond which went to negative such an idea, is implied; the bond itself is *prima facie* evidence of that, and would be so held in a suit on the bond.

In principle, then, it comes to this, that such a bond, in the hands of Job Taylor Jr., was no more notice to Job Taylor Sr., his vendee of the land and assignee of the bond, that the purchase money remained unpaid, and was yet due and owing to Burns, than if Job Jr. had held a deed in fee simple from Burns for the land. That would have been only *prima facie* evidence that the purchase money had been paid, and such a bond was equally so.

But Burns was in possession of the land. This fact alone made it necessary for a purchaser from Job Taylor Jr. to make further inquiry, before he purchased from one out of possession. If Job Jr. had then held a complete deed, instead of only a bond for titles, the same rule would have prevailed. The fact that another was in possession of the land was sufficient to put a purchaser upon inquiry, and would preserve a *lien* against any who might be willing to hazard a purchase without making inquiry.—Brewer v. Logan, 19 Ala. 481.

We find that Job Taylor Sr. did make inquiry at the proper quarter. He went to Burns, who was in possession, and talked, it seems, fully with him about having an intention to buy the land, if the title was good. Burns advised him to buy at the price he afterwards gave, and, in answer to a question evidently intended to elicit all he knew that would make for or against the propriety of such a purchase, told Job Sr. that if he bought there would be no difficulty about the title to the land. Ac-

cording to the testimony of Rowe, he assured said Job Sr. that the title was good.

Whatever may be the hardship upon him, to hold that such acts and such language from Burns, in respect to this land, will not amount to a waiver of his *lien* in favor of Job Taylor Sr., would be to protect a man from the natural consequences of his own acts, and cast any injury that may result from them upon the party who acted on the faith of them. There is every reason to suppose, that the conduct and declarations of Burns influenced the subsequent purchase of the defendant Taylor.

In such a connection as it occurs here, what is the reasonable and just interpretation of an assurance by one man to another that the title to a tract of land which the latter is about to purchase is good? Is it merely that the chain of title can be traced without difficulty to a source that is unquestionably good, (to the Federal Government, for instance, with us, where the land has been once public)? Would that be the common, popular understanding between two men of ordinary intelligence in our country, who were in a negotiation about the sale and purchase of a tract of land? It cannot be pretended. On the contrary, they would mutually understand such an assurance to carry with it the idea that the seller would convey, and the buyer would receive, a title good against all conflicting claimants, and also good or free from all *liens*, incumbrances and equities.

But this is not only the popular, it is the legal signification of such terms in a promise, agreement or covenant. These bonds "to make title,"—"to make a good and sufficient title,"—are obligations to convey the legal estate in fee, free from all valid claims, liens, or incumbrances whatever.—10 John. 266; 1 Blackf. 380; 12 Ala. 39. When, therefore, Burns, who then held a vendor's *lien* for the purchase money, as against Job Jr., who held his bond for title, advised Job Sr. to purchase the land, and, instead of disclosing to him the fact that the purchase money was unpaid, and that he held a *lien* to that extent upon it, assured him, in reply to his demand for information, that if he bought there would be no difficulty about the title, and that he would get a good title, his acts and his words amount in law to an abandonment, a waiver, of his *lien* in favor of Job Taylor Sr. His acts amount to an *estoppel in pais* of his right to assert this *lien* against the man whose purchase may well be supposed

to have been influenced by them.—2 Sugden on Ven. 299; 33 Cond. Eng. C. L. R. 115; Roland v. Day, 17 Ala. 681; Stone v. Britton, 22 *ib.* 543.

His surrender of the possession of the lands to the agent of Job Taylor Sr., after the purchase, without any intimation that he held a *lien* upon them, would go far to indicate that he himself then put the same interpretation upon his previous acts.

But it is urged that, when Burns was afterwards applied to and requested to assign Washburn's bonds to Job Sr., he then set up his *lien*, and refused to make the assignment, until it was agreed on the part of Simeon Taylor, who was acting in the matter for Job Sr., that such assignment was not to be considered as affecting in any manner the *lien* he might have for the purchase money.

We readily concede, that, if the *lien* had not been forfeited by what had transpired previously to that assignment, there was nothing in it that would deserve to work such a consequence. If the *lien* was good then, the assignment with the express stipulation of Simeon Taylor, who acted for Job Taylor Sr., that it should not be affected thereby, would not have impaired it in the least. And whether Simeon Taylor had authority from Job Sr. to make such a stipulation or not, would make no difference, if Job Sr. acquired any advantage by the assignment, and insisted upon holding on to it; the stipulation would bind him, if he gained anything by it which he claimed to retain, even without a previous authority, for that would be an adoption of the act.

But he gained, in legal contemplation, nothing by the assignment that he was not already fully entitled to from Burns by the condition of this bond, namely, a deed in fee simple for the land, with covenant of general warranty for quiet enjoyment, and against all liens and incumbrances. Burns' bond to Job Taylor Jr., assigned to Job Taylor Sr., bound him to make a deed in fee simple. Washburn's bond to him bound Washburn to make a deed to him. But, instead of making a deed himself direct to Job Sr., he assigns to him Washburn's bond in place of his own, and Washburn makes the deed direct to Job Sr. There was nothing gained by Job Sr. in this arrangement, so far as Burns was concerned. It was only taking an assignment of Burns' bond, instead of his deed, which he was

bound in law to make; and this surely could work no prejudice to him. The stipulation of Simeon Taylor, therefore, that the assignment of Washburn's bond should not affect any *lien* for the purchase money which Burns then held, regarding it as the stipulation of Job Taylor Sr., amounted to nothing. There was no *lien* to lose; it had been forfeited already. And if Burns assigned the bond, under the influence of such a stipulation, he did no more, at last, than was for his own benefit, and that fulfilled, in a way entirely for his own advantage, the obligation of his bond to make title to these lands.

Seeing that the decree of the chancellor dismissing the bill is well justified upon a full consideration of the merits of the case, we deem it unnecessary to examine or decide the question which is presented by the argument of defendants in error, in relation to the necessity for making the plaintiffs in the judgments against Job Taylor Jr., and which the bill alleges now belong beneficially to the complainant, parties to the bill as defendants.

In view of what has been already said, it is only necessary to add that the decree of the chancellor dismissing the bill is affirmed, at the cost of plaintiffs in error.

GANTT'S ADM'R *vs.* PHILLIPS.

1. In detinue by an administrator *de bonis non* against a purchaser from the widow, who was named executrix in the will, for the recovery of a slave bequeathed to her for life, her legal appointment and qualification as executrix may be presumed after the lapse of twenty years, without the production of the record, from the existence and production of the will and its probate, an inventory and appraisement of the estate purporting on its face to be made under the authority and sanction of the court, and proof that the executrix acted as such from the testator's death until her own, paid the debts of the estate, kept the property together as directed by the will, and exercised ownership and control over it; that the heirs and legatees acquiesced in her acts and deeds in reference to the property for more than twenty years, and that the records of the Court of Probate of the county in which the will was probated were loosely kept for a series of years about that time.

2. And in such case, the inventory and appraisement, and evidence of the acts and declarations of the executrix, legatees and distributees, are admissible, as laying the predicate for the court to leave to the jury the question of the legal appointment and qualification of the executrix.

3. If the executrix named in the will, to whom a life estate in slaves is bequeathed, takes out letters testamentary, and takes possession of the estate, returning an inventory thereof, her legacy thereby vests in her, unless she expressly dissents from the will; and the remainder limited upon her life estate becomes vested by the same act, and cannot on her death revert to the estate.

Error to the Circuit Court of Dalllas.

Tried before the Hon. Nathan Cook.

Detinue by the plaintiff in error, William E. Bird, as administrator *de bonis non*, with the will annexed, of Robert Gantt, deceased, against the defendant in error, for the recovery of a negro man slave, named Phil, alleged to have been the property of said testator in his lifetime, and of which he died in possession. The pleas were, *non detinet* and the statute of limitations. Verdict and judgment for the defendant below.

On the trial a bill of exceptions was allowed, by which it appears that the plaintiff offered in evidence the will of the testator, by which it appeared that he left to his six youngest children, to be equally divided among them, all his estate both real and personal. By the second clause of the will he says: "It is my desire that my wife, Elizabeth Gantt, during her natural life, or during her widowhood, shall possess, occupy and enjoy my said estate, for the support of herself and family."

The plaintiff also offered testimony tending to show that the testator died in possession of the slave in question, and that he was in possession of the defendant at the time of suit being brought, and proved the death of Elizabeth Gantt, the widow of the testator, in the early part of the year 1845. He also offered evidence tending to show a demand and refusal to deliver up the slave, and his value &c. The plaintiff also introduced, as a part of his evidence, the answer of the defendant in chancery, to a bill filed against him by the heirs of the testator, and proved by Dr. Gantt, the son of the testator, that he had never heard of any other administration on the estate of the testator than that of the plaintiff. This administration commenced in 1852. The copy of the will, read in evidence, purported to be

a transcript from a book of records of wills in Dallas County. Said will was dated in 1818, and was proved by Jesse Beene in 1823, the said testator having died in the last named year.

The said Dr. Gantt, on cross examination by the defendant, stated, that his mother, said Elizabeth Gantt, removed from this State to Louisiana about the 1st January, 1845, and carried all the remaining property of the estate with her; that no objections were made to her removing the property, either by heirs or creditors; that Robert Gantt in Tennessee, where he died, was indebted to one McGhee $1200; that said Elizabeth Gantt, after the death of Robert Gantt, paid said debt, by disposing of certain lands of the estate to that purpose, and also by disposing of a negro man belonging to the estate to said McGhee, for the same purpose.

The defendant proved by one White, that he was present at a trade made between said Elizabeth Gantt, the widow aforesaid, and the late Dr. Geo. Phillips, in the year 1831 or 1832; that Elbert Gantt, then a minor, and one of the legatees of said Robert Gantt, came over to the plantation of Dr. Phillips, and stated to him that his mother, the said Elizabeth, desired to trade for his negro man, and wished him, said Phillips, to go over to his residence to see her upon the subject; upon that request, said Phillips went over to see her, accompanied by said White, the witness; Mrs. Gantt then proposed to exchange two small boys, Phil and another, for a man belonging to said Phillips, she stating that she owned the wife of said negro man, and that she would give in exchange the two boys for the negro man and one hundred dollars; she urged, as an additional reason, that she owned no negro man, and that the family very much needed one, to cut and haul wood, and do other work which could not be done by women; that said Phillips asked her, if she had the authority to sell the negro boys, to which she replied that she had by her husband's will, and also that the negro man and the one hundred dollars was a full and fair consideration and more. Said White further stated, that her son Elbert and three of the daughters, minors, were present, all of whom requested the said Phillips to make the trade with their mother, stating before and at the trade that their mother was authorized to dispose of the said negro boys; that said trade was made at the special instance and request of the said Elizabeth

and family, and the negro man and the $100 delivered to her; that said man worked on the plantation of said Mrs. Gantt until 1833, when he was sold by said Elbert Gantt. And the defendant proved that the proceeds of the sale were received by Mrs. Gantt, and were used for the support and maintenance of her and the family.

Defendant proved, that Mrs. Gantt was the head of the family, and kept the same together as in the lifetime of her husband, the testator; that she managed and controlled the entire estate, both real and personal, sold land in Tennessee to pay a debt then due and owing by the testator, and also sold a negro man here for the same purpose; that she had paid all the debts of the estate; that in 1845 she removed to Louisiana, and died during that year, taking with her all the property except what her son Elbert had previously carried there, with her knowledge and consent, for the purpose of preparing a place for the reception of herself and family; that she had no property, nor means of support for herself and family, except what she derived from the estate.

The evidence tended to show, that neither the creditors nor the heirs ever raised or made any objection to the sole management and control thus exercised over the estate. All the children, legatees and distributees of said testator were of age sometime previous to the death of the said Elizabeth Gantt.—Four of them lived with her until her death. The children had no means of support, except from the estate aforesaid.

The defendant then introduced one Craig, who testified that, in the year 1828, he was elected clerk of the County Court of Dallas County, and when he came into office he found the documents and papers therein in great confusion, and many of the orders and adjudications unrecorded, and lying in bundles about in the office, in a careless and confused manner, and among the papers in this condition was the last will and testament of said Robert Gantt deceased, above mentioned, and also an appraisement and inventory of the estate of said deceased, and the probate thereof. Said Craig also stated, that he was employed by the County Court and Commissioners of said County to file properly and record in the books of the office all such papers as had not been recorded, and that the said appraisement was the identical paper recorded by him upon such employment; upon

which proof the defendant offered the said inventory and appraisement in evidence to the jury; to which the plaintiff objected: 1st. That it could not be admitted for any purpose, under the issue made by the pleadings in the cause; 2d. Because the paper was admitted to record without any authority, and because there was no order or judgment of the court, showing that letters testamentary or of administration had ever been granted before that time. The court allowed the paper to go to the jury for what it was worth, and the plaintiff excepted.—The inventory seems to have been proved by the appraisers in February, 1824. The plaintiff also objected to the declarations of Mrs. Gantt, and also to the declarations and acts of the legatees being received in evidence for any purpose; the court overruled the objection, and the plaintiff excepted.

The court, amongst other things, charged the jury, that the record of the appointment and qualification of the said Elizabeth Gantt, as executrix of the estate of Robert Gantt, in the Orphans' Court of Dallas County, was the highest and best evidence of her appointment, and that no other evidence could show the fact but the record itself or a transcript of it, if in existence. But the court charged the jury further, that, if the proof showed to their satisfaction that the appointment and qualification of said Elizabeth Gantt as executrix had been duly made by said Orphans' Court, and that in the lapse of time the papers and records of the appointment had been lost or destroyed, so that they were not now to be found, then they might find and conclude that she has been such executrix, without the production of the record or the transcript. To so much of this charge as relates to the secondary evidence aforesaid, the plaintiff excepted.

The court charged the jury, that, if the slave sued for was included in the devise to the said Elizabeth Gantt, and was a legacy to her for life, and remained over to the other legatees, if the legacy had vested in her according to the rules before explained, that at her death the legacy became the absolute property of those in remainder, and could not return to the estate, so as to authorize the plaintiff to recover it as the administrator of Robert Gantt's estate; to this charge the plaintiff excepted.

The plaintiff asked the court to charge the jury:

1. That plaintiff is entitled to recover the slave sued for, if he was the property of Robert Gantt deceased, when he died, there being no legal proof that defendant or any one else under whom he claims ever got any legal title to him whatever, and there being no legal proof of the appointment of a representative of the estate of the said Robert Gantt deceased, before the appointment of the plaintiff. This charge the court refused to give, and the plaintiff excepted.

2. That even if the records of the Probate Court did show that Elizabeth Gantt qualified as executrix of Robert Gantt, that is a matter which the jury ought not to consider, because there was no other issue in the case than the statute of limitations and *non detinet*. This the court also refused, and the plaintiff excepted.

3. That the life estate of the said Elizabeth Gantt, in the slave sued for, expired at her death, and the title to him is in plaintiff, unless the defendant shows that he was sold after the death of the said Robert Gantt by order of the Orphans' Court of Dallas County. This charge was also refused, and the plaintiff excepted.

The court, amongst others, gave two affirmative charges which were not excepted to, but which are necessary to be stated, as they are referred to in one that was excepted to. They were as follows: That an administration upon the estate of Robert Gantt, by order of the Probate Court of Dallas County, was absolutely necessary, and the assent of the executor or administrator appointed by the court was equally necessary to vest the legacy in said Elizabeth, devised and bequeathed to her in said last will and testament, and to separate it from the estate.

That they could not presume, or infer, or find that said Elizabeth Gantt, notwithstanding her appointment in the will, and her actings and doings with the estate, was the executrix of said estate, or had any power as such, unless they believed from the evidence that she had been legally appointed and qualified as executrix by the Orphans' Court of Dallas County; and, unless she was so appointed and qualified, her legacy under the will could not vest in her, and the sale or exchange of the slave sued for, by her to Dr. Phillips, would be utterly illegal and void, and could not deprive the plaintiff of his full right to recover.

The plaintiff in error here assigns for error the matters contained in the bill of exceptions.

GEO. W. GAYLE and J. H. CAMPBELL, for plaintiff in error:

The matter most relied upon by the defendant in this case is, that presumption, which he insists arises from lapse of time, that an administration was granted on the estate of Robt. Gantt, or that letters testamentary had issued. It is not contended that this fact appears on the records of the Probate Court of Dallas County, but it is insisted that facts do exist from which the court is fully authorized and required to presume that such was the fact. As this is the chief question in the case, we will first examine it.

The first case to which we call attention is that of Thompson v. Miller, 2 Stew. 470. This case clearly shows, that matters of record cannot be supplied in any other manner than by the record itself. Wherever an amendment could not be made *nunc pro tunc*, the record cannot be supplied by presumption or intendment. It is clear that only clerical errors can be so amended, and not judicial errors or defects.—Wilkinson v. Goldthwaite, 1 Stew. & Porter 159.

It is insisted that the return of the appraisers of the property of Robert Gantt, appointed by the court, is sufficient to raise the presumption that letters testamentary or of administration had been granted. To show that this is a mistake, we refer to Moody v. Kenan, 9 Por. 257.

This return and appraisement was not recorded by order of the court, and therefore has not the force and effect of a judgment of the court, and could not, therefore, be received as evidence for any purpose.—Hall v. Hudson, admr., 20 Ala. 284; Hinson v. Wall, *ib.* 298.

In the case of Brown v. Bartlett, 2 Ala. 30, the court expressly say, that, where a fact does not appear of record, they cannot presume that such facts exists. Also, in the case of Binford v. Daniels, 13 Ala. 672, the court say: "It cannot be that the court, where there is no record evidence to amend by, can make the evidence which is to be the predicate of its subsequent action," &c. So, also, Waldo *et al.* v. Spencer, 4 Conn. 71, and other authorities referred to in Binford v. Daniels, *supra.* See, also, Bondurant, adm'r v. Thompson's Dist., 15 Ala. 203.

A record can only be amended by some matter of record.—Metcalf v. Metcalf, 19 Ala. 319. Can a record be presumed to exist, where there is nothing in the record which exists that would authorize an amendment.—See Hall, adm'r, v. Hudson, adm'r, 20 Ala. 284; Hinson v. Wall, 20 Ala. 298; Lee v. Houston, 20 Ala. 301.

These decisions have all been made upon the question of amendment, but it is presumed that the principle involved is the same in this case as in those.

In 1 Bouv. Bac. Ab. 259, it is said: "So, if the original or other part of the record be stolen, taken away, or avoided, or withdrawn by any clerk, though this be felony, yet this may be supplied and amended by other parts of the record: but if such part stolen, &c., or obliterated, cannot be supplied by the record, or any exemplification thereof, then it shall not be amended."—See Robinson v. Clifford, 2 Wash. C. C. Rep. 1.

Records, being things of the greatest dignity, can only be called in question by matters of equal notoriety with themselves. Wherefore, though the matters assigned for error (says Bacon) should be proved by witnesses of the best credit, yet the judges would not admit of it.—4 Bouv. Bac. Ab. 279. "Every question arising in a cause, concerning a matter of record, is to be tried by the record."—9 Bouv. Bac. Ab. 556, letter B. The whole of this section, and all the cases put, go clearly to show that no defect in the record can be supplied by any other evidence. What is not shown as part of the record, does not exist, and cannot be presumed to exist.

The records and written proceedings of courts of justice are the proper proof of the facts therein recorded, &c.; in all which cases any evidence, direct or presumptive, deriving its force from the will, contract, &c., such as copies, extracts, or the recollections of witnesses, will be rejected as secondary."—Best on Presumptions, 45 Law Lib. 42 § 29. This is also the doctrine of the civil law.—1 Dom. Civil Law, Book 3 Tit. 6 § 2, Proofs and Presumptions, page 441, Folio ed. In Louisiana, it has been decided, "that the deposition of a witness is inadmissible to prove anything contrary to, or explanatory of, a judgment rendered in a suit between the same parties: *aliter*, to prove that one of the parties was in possession of a separate estate."—Skipwith v. Creditors, 19 La. Rep. 198.

Also, that parol evidence is inadmissable to show that a judgment was not pronounced on a particular day.—Nolan v. Babin, 12 Rob. Rep. 531. Also, "that a probate judge, by whom the bond of an administratrix was accepted, and letters of administration granted, cannot be heard as a witness, to prove that one of the parties by whom the bond was signed executed it on the express condition that other persons who never signed it should become co-sureties with him; nor can any other person be received as a witness to establish such fact."—Taylor v. Jones, 3 An. La. Rep. 619; see, also, Broussard v. Burnard, 7 La. Rep. 216. "Where the question was, whether particular persons were parties to certain probate proceedings, held that the best evidence of the fact was the record itself."—Williams v. Duer, 14 La. Rep. 523.

It is admitted that, if it was shown affirmatively that the record here relied upon, or rather presumed, could be shown ever to have existed, and its loss or destruction could be shown, then secondary evidence might be resorted to; but not otherwise.—Childress v. Allen, 17 La. Rep. 37; 3 Robinson's La. Rep. 33; Beard v. Moraney, 3 *ib.* 119.

"The testimony of a judge of probate, in whose office a will should have been deposited, that he had seen the will in his office, but had searched for it in vain, cannot authorize the introduction of parol evidence of its contents, and of its having been proved and ordered to be executed, where the minutes of the probate court are not introduced, nor alleged to have been lost, mislaid or destroyed; such evidence, though admitted without objection, would be insufficient to establish the will."—Dash v. Dosson, 6 Rob. Rep. 11; see, also, Jones v. Hunter, 6 Rob. 235; Lockhart v. Jones, 9 Rob. Rep. 381; Chappin v. Michael, 11 Rob. Rep. 233.

"Parol evidence is inadmissible to prove the appointment of a curator to a succession, unless it be first shown that the record of his appointment has been lost.—Rouley v. Berand, 11 Rob. Rep. 478.

"In consequence of the notorious want of care in the preservation of the public records in the county parishes, the absence of such record evidence, when applied to ancient proceedings, raise but a remote presumption, and one which must be held subordinate to the violent legal presumption, that the judge before

whom the proceedings were had did his duty."—Gentile v. Foley, 3 An. La. Rep. 146.

So, though "a transcript of judicial proceedings show that a *fi. fa.* was issued against a party, the existence of a judgment will not be inferred."—Pickett v. Bates, 3 An. La. Rep. 627; Thompson v. Chaureau, 6 N. S. La. Rep. 462; Cassanora v. Agro, 3 La. Rep. 212; Thompson v. Rodgers, 4 La. Rep. 12.

Upon questions of this character it is submitted, that the decisions of the courts of Louisiana are of just as high authority as those of any other State, for the reason that their rules of evidence are all drawn from the common law.

The law will presume that all persons upon whom duties have been imposed have duly discharged them, and hence the judgments of the courts of competent jurisdiction are presumed to be well founded and their records to be correctly made.—Best on Presumptions, 45 Law Lib. 59; 1 Starkie on Evidence 253.

It is a principle of law, that irregularity will not be presumed. Best on Presumptions, 45 Law Lib. 64; 3 Mees. & Wels. 65.

In 19 Conn. 489 it is said: "The records of a court of competent jurisdiction import verity, and cannot be contradicted. Therefore, where the record of a justice of the peace, in a criminal proceeding of which he had cognizance, stated that the defendant was called and made default of appearance, and the defendant in a subsequent suit offered testimony to prove that he in fact appeared at the time and place appointed, and then temporarily withdrew by the permission and at the request of the justice, it was held that such testimony was not admissible.—See, also, Hard v. Shipman, 6 Barb. Sup. Ct. Rep. 621; Littleton v. Christy, 11 Miss. Rep. 390.

The following case is referred to, as being in point in two aspects of this case: 1st, as showing that the recording of the appraisement by Roberts, the deputy clerk, without the order of the court, gave it no validity; 2d, that the record is obliged to be taken as it appears, without change. Where it appeared from the docket of the clerk of the court, that a party with his surety entered into a recognizance to prosecute an appeal from a judgment of the District Court to the supreme judicial court, and the clerk died before the recognizance was extended on the books of record, it was held that, although the subsequent clerk might, by direction of the court, complete the imperfect record

of the deceased clerk, yet the new clerk had no authority to do it without such directions, and the minutes or short notes of the clerk upon the docket must stand as the record, until a more extended and intelligible record should be made up therefrom."—Maine (14 Shep.) 179.

More direct and positive, however, to the first point is the case of Bank v. Donaldson, 6 Barr's Rep. 179. The statement is thus made: "The mere fact that a paper is found in a bundle of papers, in a case in the clerk's office, is not sufficient to make it an office paper, and admissible as evidence."—2 An. Sup. U. S. Dig. 164, § 34. See, also, Struther v. Reese, 4 Barr's Rep. 129.

"The records of a court cannot be explained by parol testimony.—3 Dev. Rep. 423. When the records are made up, no power but that of the court itself can touch them to alter them."—4 Iredell's Rep. 534; 2 Sup. U. S. Dig. p. 689, §§ 48, 55; 2 Eng. Com. L. Rep. 348; 14 *ib.* 265; 17 *ib.* 177.

For the purpose of showing the strictness with which record evidence is regarded, we refer to Rex v. Bellamy, 21 Eng. Com. L. Rep. 406.

It has also been held in Virginia, Buford v. Buford, 4 Munford's Rep. 241, that the only competent evidence that an award, made *pendente lite*, was afterwards set aside on exceptions taken, is a transcript of the record thereof duly authenticated."

We call attention particularly to the case of Bohn v. Sheppard, 4 Munf. Rep. 403. On the question now under discussion, the court say: "Although, in controversies concerning wills, roads, the probate of wills, and granting of administrations, the superior court of law, to which an appeal is taken from the county or corporation court, may hear new evidence upon questions submittted to its revisal on the record, it ought not to receive any evidence but that of the record itself, to prove what questions were in fact tried in the court below."

The point upon which the defendants below mainly rely is upon lapse of time, from which they say the court must presume the grant of an administration. It might be a sufficient reply to this, to say that they were chargeable with notice of the character of the title they took. The will had been admitted to probate, and was spread upon the records.

But we state it as a general rule, that presumptions cannot

be indulged against the heir, and as it is shown by the record that there are no debts here to be settled, the suit is for the benefit of the heirs. To this point, see Best on Presumptions, 45 Law Lib. p. 101 § 112; Doe *ex dem.* Graham v. Scott, 11 East 478, marg. 479. In the case of Doe *ex dem.* Fenwick v. Reed, 7 Eng. Com. L. Rep. 79, Abbot C. J. says, that these presumptions or grants have already gone too far. To this we refer as a strong case, in our favor.

The case of the Heirs of Bishop v. Hampton, 15 Ala. 768, is clear and explicit, that the record cannot be supplied by parol. To the same effect is Bishop's Heirs v. Hampton, 19 Ala. 797.

Wm. M. Murphy, *contra:*

In Maine, in the case of Battles v. Holley, 6 Greenl. R. 145, in the case of real estate, after a lapse of thirty years, the authority and qualifications of an administrator were presumed, from the existence of an inventory and a schedule of claims in the probate office, attested by his oath, &c.; the probate records and files of that period appearing to have been loosely kept, and no other vestige of his appointment being discoverable. The court say, on page 147: "We entertain no doubt that the jury were well justified in presuming that the administrator was duly appointed and qualified." The judge in the court below, after summing up the facts, charged the jury, "they would be justified in presuming the regularity of his appointment and qualifications;" this charge was affirmed. It will be remembered that this record shows that Craig was employed to arrange the papers and record them in the office of the Orphans' Court of Dallas County, in 1828; that he found this will and inventory and appraisement, not recorded; and that all the papers in the office were in great confusion, no record made of them, no file, and no order preserved; and that he, in 1828, five years after probate, recorded this will and inventory and appraisement.

In Thomas *et al.* v. Hatch, 3 Sumner 179, Judge Story says, in reply to the argument that no commission was produced from the probate court of the guardianship of a *non compos mentis:* "It is true that no commission is produced or can now be found on the probate records. But other papers are produced," (an inventory of the estate, and account settled and allowed.) "Un-

der such circumstances, there is certainly strong *prima facie* evidence, after such a lapse of time, to supply the direct proof of a probate appointment, and we all know how loosely, in those times, the records of the courts of probate were kept."

In South Carolina, in Sims v. Aughtery, 4 Strobh. Eq. 117, 118, after a possession of twenty-five years of slaves, the court say: "The court will presume a sale by the executor, for the payment of debts, an administration *de bonis non*, a sale by such administrator, or almost anything else, in order to quiet the long possession. This is strong language, but not stronger than is warranted by the authorities."

In Massachusetts, in the case of Gray v. Gardner, 3 Mass. 399, the judge in the trial below instructed the jury "that they might lawfully presume that the administrator had in fact published the advertisements, and taken the oath required by the statute previous to the sale; the length of the time after the sale, &c.; and that the probate records are now incomplete." The Supreme Court of Massachusetts, on page 402 of this opinion, use these words: "The court are satisfied that the judge's direction to the jury was correct, and that the jury made a fair and legal presumption. This was a case of the sale of lands by an administrator, and twenty years acquiescence, &c. In the case last cited, it was in evidence that the probate office had been kept in a loose and careless manner.

In Mississippi, in the case of Stevenson's Heirs v. McReary, 12 Sm. & Mar. 11, the same point of presumption was established, where it was shown that, "at the time, the officers who had charge of the records of the probate court were negligent in the discharge of their duties; and such proof is legal, to show the probability of the loss of the record." In this case, many of the American authorities are cited and examined,—among them a strong case of presumption from lapse of time from Vermont.—Hazard v. Martin, 2 Verm. 84; Beall v. Lynn, 6 Har. & Johns. 361; 6 Martin's (La.) Rep. 153, N. S. Many cases are also cited from New York, on page 50.

In Best on Presumptions, 98 to 100, §§ 109, 111, 47 Law Lib., it is said: "It is difficult to contend that there can be any matter of fact which a jury may not presume from possession and circumstances, when that possession and those circumstances are sufficiently strong to convince them of its existence."

"Lawful executorship will be presumed from lapse of time." In the case of The King v. The Inhabitants of Barnsley, 1 M. & Sel. 377, an executorship was presumed after lapse of time.

2. The jury had a right to determine the question presented in this record.—See 1 Greenl. on Ev. 53, § 48; also § 47, p. 52. Speaking of presumptions falling within the "exclusive province of the jury, he uses these words: "They are usually aided in their labors by the advice and instructions of the judge, more or less strongly urged at his discretion; but the whole matter is free before them, unembarrassed by any considerations of policy or convenience, and unlimited by any boundaries but those of truth, to be decided by themselves according to the convictions of their own understanding." In 3 Bacon's Abr. 618, (H,) of Presumptive Proof, it is said: "Presumptions of law and fact are such artificial presumptions as are recognized and warranted by law as the proper inferences to be made by juries under particular circumstances."

In Alabama, in Rhodes' Ex'rs v. Turner & Wife, 21 Ala. 210, this court have decided, if the parties allow twenty years to elapse without calling an executor to a settlement, the presumption of payment arises in his favor. This is the only case I can find of our decisions, upon the effect of the lapse of time.

Under the influence of these decisions as to the effect of lapse of time, long acquiescence, fair and *bona fide* sale, full consideration, the probate of the will, the return of inventory and appraisement, the loose and careless manner in which the records of the probate court were kept, as shown by the testimony of Craig, the payment of the debts of the estate, the sale of real and personal estate in conformity to the will, the education and support of the children, the keeping of the estate together, the fact that she was sole executrix,—take all these facts, and then refer to all the charges of the court, and the charges will be sustained. All the facts did create such a presumption as should have been left to the consideration of the jury.

3. If, then, this presumption was a matter of fact for the jury, then this plaintiff has no right of action, as the record shows the assent of the executrix to the legacy in the will. She being a legatee for life, with remainder to her children, vested the estate in them as remainder at her death, and not in this administrator. To this point authority is unnecessary. An

executor's assent to the particular estate in chattels or slaves will be deemed sufficient assent to the remainder.—Adie v. Cornwall, 3 Monroe 283; 2 J. J. Marsh. 494; 2 Williams on Ex'rs, top p. 985.

4. As to assent to legacy, see 2 Williams on Ex'rs 850; 2 Lomax on Ex'rs 132-3.

5. It will be particularly observed, that the plaintiff moved to exclude from the jury the declarations and acts of Mrs. Gantt and the distributees, and then introduced, as his own evidence, the answer in chancery of Wm. S. Phillips, the defendant, in which the court will find all these declarations and acts fully detailed, and which are the same plaintiff moves to exclude.

6. The plaintiff introduced the will, and then moved to exclude the inventory. The judge permitted it to go to the jury for what it was worth as a circumstance. By reference to the record, the court will find the inventory and appraisement sworn to by the appraisers before the judge of the County Court, as "all the personal estate shown to them by the executrix of the last will and testament of the said deceased." Thus in the affidavit prepared by the judge, he recognized and named her as the lawful executrix, &c.

7. It will be unnecessary to review the charges asked and refused. If this court should determine the facts of presumption were properly left to the jury, the fourth charge asked and refused was properly refused. If the executrix took the precedent estate, with assent to the legacy, the remainder-man can sue upon the termination of her particular estate, and this plaintiff, as administrator, has no right. An assent once given cannot be retracted.—Williams on Ex'rs, top p. 986. There is no pretence that this assent was ever retracted; on the contrary, the record shows that she had the estate in her possession twenty-two years, and at the time of her death.

GIBBONS, J.—The court, after charging the jury that the record was the best and only evidence of the appointment of Elizabeth Gantt to the office of executrix of Robert Gantt, deceased, and of her qualification therein, if said record was in existence, further charged as follows: "Yet, if the jury are satisfied from the proof, that she had been appointed, and had qualified as aforesaid, and that, by the lapse of time, the papers

and records of the appointment had been lost or destroyed, so that they were not now to be found, then they might find and conclude that she had been such executrix, without the production of the record or the transcript." This presents the main question in the cause.

We regard this language as tantamount to saying to the jury that they might, if they chose, from the proof before them, after such lapse of time, presume the appointment and qualification of Elizabeth Gantt as the executrix of the last will and testament of Robert Gantt, deceased. The authorities are very numerous, and particularly in this court, that a record cannot be amended, except by the record.—Thompson v. Miller, 2 Stew. 470; 1 Stew. & Porter 159; Moody v. Kenan, 9 Porter 257. Nor is it competent, as a general rule, to enlarge a record by parol proof.—Brown v. Bartlett, 2 Ala. 30; Binford v. Daniels, 13 Ala 672; Bondurant, adm'r, v. Thompson's Distributees, 15 Ala. 202; and to the same effect are numerous other decisions of this court. Neither can parol proof be received to contradict or vary a record.—Bishop's Heirs v. Hampton, 15 Ala. 761. These principles are all conceded, and yet it is believed that none of them come up to the case presented in the charge of the court, as the effect of the lapse of time, in the cases above cited, forms no element. This, it is believed, is of itself sufficient to distinguish the case at bar from the above cited authorities.

Of the effect of the lapse of time, in support of possession, Mr. Best remarks: "There is hardly a species of act or document, public or private, that will not be presumed in support of possession. Even acts of parliament may be thus presumed, as also will grants from the crown, letters patent, writs of *ad quod damnum*, and inquisitions thereon, by-laws of corporations, fines and recoveries, the enfranchisement of copy-holds, endowment of vicarages, exemption from tithes, consent of ordinary to composition deeds, &c. So, likewise, the disseverance of tithes by the requisite parties, previous to the restraining statutes, copy-hold customs, admittance to and surrender of copy-holds, and lawful executorship, will be presumed from lapse of time."—Best on Presumptions 98 § 109.

In the case of Rex v. The Inhabitants of Barnsley, 1 M. & Sel. 377, the facts bear some analogy to the case at bar. The

question was, whether a certain pauper and his family had a residence in a certain town or not; and this depended upon another fact, to-wit: whether the assignment made by a certain woman, of articles of apprenticeship of the father of the pauper, was made as executrix of her husband, or simply in her individual capacity. John Gill, the father of the pauper, was bound an apprentice to Thomas Harrison, of the township of Clint, for seven years. He served five years of his time, when Harrison, the master, died. His wife, Elizabeth Harrison, in 1769, assigned the articles to Wm. Bradfield, calling the apprentice her apprentice, which she assigned to the said Bradfield for the remainder of the term. The apprentice went with the said Bradfield, and served the remaining two years. It was conceded that the validity of this assignment would fix the residence of the pauper, and the validity of the assignment depended upon the fact whether or not Elizabeth Harrison was or was not the executrix of her husband. The question arose after the lapse of about forty years; and Lord Ellenborough remarked: "The assignment (which it is admitted was not at the time required to be stamped) is in its form an assignment by the widow as *my apprentice;* and, at this distance of time, we will presume, if necessary, that she was lawful executrix."

In this country, courts have gone very far in the same direction.

In Battles v. Holley, 6 Greenl. 145, "after the lapse of thirty years, the authority and qualification of an administrator were presumed from the existence of an inventory and a schedule of claims in the probate office, attested by his oath, and a petition preferred by him to the Court of *Common Pleas* for license to sell the real estate of his intestate, with the original certificate of the judge of probate thereon, recognizing him as an administrator, the probate records and files of that period appearing to have been loosely kept, and no other vestige of his appointment being discovered." The presiding judge in this case uses the following language: "The authorities cited for the tenant present cases in which presumptions similar in principle have been held to be warranted and sustained. Public documents may be lost, or destroyed by inevitable accident, or by the negligence of those who are charged with their custody; but rights depending on them, long enjoyed, are not therefore to be de-

feated. Every fair presumption, arising from such enjoyment and other existing evidence, may and ought to be deduced, by which such rights may be upheld. A failure of proof in a recent transaction is not entitled to the same indulgence. It warrants rather the inference that what is not proved never existed."

Again, say the court in the same case: "We entertain no doubt that the jury were well justified in presuming that the administrator was duly appointed and qualified." The judge at *nisi prius* told the jury that they would be justified in presuming the regularity of the appointment and qualification of the administrator; and this charge was affirmed by the appellate court.

In Thomas *et al.* v. Hatch, 3 Sumner 179, is found the following head note: "Papers from the probate records, showing that a person was treated by the probate court as the lawful guardian of a *non compos*, will be received as *prima facie* evidence, after a long lapse of time, to supply the direct proof of a probate appointment." "*It is true* (says Judge Story) that no commission is produced, or can now be found on the probate records; but other papers are produced from the probate records, which show that he was treated by the probate court as the lawful and regular guardian. Thus the court received an inventory of the estate of the *non compos* from him as guardian in 1792, and as long ago as 1808 it settled and allowed an account with him as guardian. Under such circumstances, there is certainly strong *prima facie* evidence, after such a lapse of time, to supply the direct proof of a probate appointment, and we all know how loosely in those times the records of the court of probate were in many cases kept."

In Sims v. Aughtery, 4 Strob. Equity R. 103, the court uses the following language: "After a possession of twenty-five years, the court will presume a sale by the executor for the payment of debts, an administration *de bonis non* after Lyles' death, a sale by such administrator, or almost anything else, in order to quiet the long possession. This is strong language, but not stronger than is warranted by the authorities, or demanded by a stern and imperative public policy."

Gray v. Gardner, 3 Mass. 399, was a real action by the plaintiff, as heir of his father, against the person in possession of

the property. The defence was, that the administrator of the estate had sold the lands by order of the court, and the tenant in possession defended on this title. The heir had acquiesced in the sale for twenty years, but the defendant could show in evidence only the order for the sale and the sale in fact, without being able to show several other statutory requisitions in such sales. The court trying the cause at *nisi prius* instructed the jury, in effect, that they might, if they chose, from the evidence before them, after that lapse of time presume the deed made by the administrator, and his proceedings at the sale, regular; and the Supreme Court, upon that point, say: "The court are satisfied that the judge's direction to the jury was correct, and that the jury made a fair and legal presumption." It will be observed in this case, also, it was shown that the records of the probate office were at the time loosely kept.

In Stevenson's Heirs v. McReary, 12 Sm. & Mar. 9, which was an action of ejectment for the recovery of lands, will be found the following head note: "While the rule is well settled, that the probate courts cannot order a sale, unless every thing necessary to give them jurisdiction of the person and of the subject matter appears upon the records; yet, when an administrator made a sale of real estate of his intestate, gave the purchasers a deed, in which he recited that the steps required by law had been taken, and placed the purchaser in possession; and thirty four years afterwards, the heirs of the intestate brought an action of ejectment for the land; held, that the court would presume from the lapse of time, and the defendant's undisturbed possession, that the administrator had complied with the requisites of the law, though in some particulars the records of the prbate court did not show that he had done so; and this presumption will prevail, unless it can be shown affirmatively that the administrator did not sell according to law; upon proof of which, the presumption would yield;" and further, "that such a presumption is strengthened, by the proof that the sale took place in the infancy of the government, and that the officers, who at the time and subsequently had charge of the records of the probate court, were careless and negligent in the discharge of their duties; and such proof is legal, to show the possibility of the loss of the record."

These authorities are certainly persuasive to show that, under

some circumstances, juries may be allowed, from lapse of time, to presume facts, in reference to records, which the record itself does not show. The question then arises, whether the evidence in the present case authorized the instruction. The facts before the court were, the will of the testator, bearing date in 1818, and probated in 1823; an inventory of the estate, purporting on its face to have been made under the authority and sanction of the court; the appointment of the said Elizabeth Gantt as executrix by the testator; her acting as such from the death of her husband until her own death; her paying the debts of the estate, keeping the property of the estate together as was directed by the will, and exercising ownership and control over it; her acts and deeds in reference to the property being acquiesced in by the heirs, from the time that she first assumed the management and control of the property, in 1823, until 1845 or 1846, when she died; the acquiescence of the heirs in the defendant's possession of the slave in question, and in the possession of the father of the defendant, from the year 1841 or 1842 until 1851, when suit was brought, about twenty years; a *bona fide* exchange of property and consideration given, with the additional fact that the records of the probate office of Dallas County were loosely kept for a series of years about the time the will was probated: all these facts taken together, in our opinion, make a case well warranting the instruction of the court. Under the circumstances, we consider the court left the question to the jury quite as favorably as the plaintiff was authorized to demand, inasmuch as the jury are told, "if they are satisfied from the proof that the appointment and qualification of the said Elizabeth Gantt as executrix had been duly made by said Orphans' Court, and that in the lapse of time the papers and records of the appointment had been lost or destroyed, so that they could not now be found, then they might find and conclude that she had been such executrix, without the production of the record or transcript." In our opinion, the testimony fully authorized this instruction, and the plaintiff has no reason to complain of the manner in which the question is left to the jury. There was, therefore, no error in this instruction of the court. In the case of Rhodes, ex'r, v. Turner & Wife, 21 Ala. 210, where parties had allowed twenty years to elapse without calling the executor to account, it was held, that the lapse of that time

warranted the presumption of payment in favor of the executor. This is only applying the same principle to a different subject. To the same effect is the case of Barnett v. Tarrence, at the present term of this court.

It needs no argument to prove that, if the said Elizabeth Gantt took out letters testamentary, and as the executrix of the estate took possession of the property, and had an inventory returned to the court, the legacy of her life estate thereby vested, unless she expressly dissented from the will. Indeed, her assent to the provisions of the will, under the circumstances, will be presumed, until the contrary is made to appear; and her legacy thereby becoming vested, the remainder over after her life estate became by the same act vested in the other legatees named in the will, and could not by the death of the said Elizabeth revert to the estate of the said Robert Gantt. This shows the correctness of the other affirmative charge excepted to by the plaintiff in error.

The principles of these two charges being thus settled, it follows as a necessary consequence, that court the committed no error in refusing the charges prayed, as the principles involved in these charges are the converse of those already discussed.

The only remaining matter of error, not covered by what has already been said, is the admission of testimony objected to by the plaintiff below. This was the inventory and appraisement, accompanied by the testimony of Craig, the acts and declarations of Elizabeth Gantt and the other legatees under the will and distributees of the estate. All this testimony we consider legitimate, as forming a predicate for the court to leave to the jury, after the lapse of time shown to have existed, the power of presuming, if they thought proper, the legal appointment and qualification of the said Elizabeth Gantt as executrix of the last will and testament of Robert Gantt, deceased.

We find no error in the record, and the judgment is affirmed.

CROCKER & WIFE *vs.* CLEMENTS' ADM'R.

1. Under the act of February 5, 1846, an attachment lies against husband and wife, non-residents, to subject the wife's separate estate, secured to her by ante-nuptial contract, to the satisfaction of a debt contracted by her *dum sola.*
2. Where the legal and equitable remedies by attachment are concurrent, the statute of limitations is the same in both forums.
3. When a person receives money under a decree which is afterwards reversed on error, the statute of limitations commences to run in his favor from the reversal.
4. In making an application of the legal statute of limitations, the Courts of Chancery also adopt and give effect to the exceptions and qualifications of the statute.
5. To effect the bar created by the statute, the defendant must have resided within the State during the whole period prescribed by it, but it is not necessary that his residence should have been continuous.
6. Where a decree is reversed on error after the money has been collected under it, and the suit is subsequently dismissed for want of prosecution in the court below, the defendant in the decree is *prima facie* entitled to recover back the money, and the burden of proving an equitable right to retain it is cast on the plaintiff.
7. When an answer in chancery is used as evidence by the complainant, in an action at law subsequently instituted, the whole answer, so far as it is pertinent to the issue, must be taken together, whether its allegations are strictly responsive or set up affirmative matter in avoidance.
8. When suit is brought to recover back money paid on a decree, which was afterwards reversed on error because the allegations and proof did not correspond, the defendant can derive no benefit from the master's report in the cause, although no exceptions were taken to it; the report falls to the ground with the decree.
9. The Courts of Chancery allow interest whenever it would have been recoverable at law.

ERROR to the Chancery Court of Mobile.

Heard before the Hon. J. W. LESESNE.

This proceeding was commenced on the 16th May, 1851, by bill in equity, filed by Henry W. Clements, administrator of Joshua Clements, and after his removal from the office of administrator, revived in the name of Thos. T. Bolling, the administrator *de bonis non*, against the plaintiffs in error, on the 24th day of November, 1851. The case substantially made by

the record is, that Mary E., the wife of Crocker, then Mary E Kellogg, in 1830, while sole and under age, exhibited her bill by her next friend in the chancery side of the Circuit Court of Mobile County, against Joshua Clements, the intestate of the defendant in error, for an account and recovery of the profits, &c., of certain mills and lands claimed to be jointly owned by Theron Kellogg and said Clements, but exclusively occupied by said Clements. The complainant averred that she was the only heir of said Theron, and as such entitled to the share of the profits to which he would have been entitled; that on the 17th day of January, 1839, a decree was rendered in her favor for $9,178 $\frac{56}{100}$. On the 8th June, 1839, an execution issued upon this decree, and was levied on five slaves as the property of the intestate, which were sold the 8th day of August of that year for $2625, which was paid to the complainant.

After this payment, in January, 1840, this decree was reversed by the Supreme Court, and the cause having been remanded, was shortly afterwards dismissed for want of prosecution in the primary court.

In 1840 the said Mary E. married the said Henry W. Crocker, and before their marriage they entered into a marriage contract by which, the bill charges, her husband became vested with the legal title to her property both real and personal, for the sole and separate use and benefit of said Mary.

It is charged that said Crocker and wife reside without the limits of this State, and an attachment in chancery was prayed and obtained. The complainant insists that Kellogg had no interest in the premises, and no right to the money thus recovered, and prays that it may be decreed to him as administrator, &c.

The answer of Crocker and wife admits the facts charged, except that they deny the allegations as to Theron Kellogg's interest; they insist, on the contrary, that he was either a joint owner of the premises with Joshua Clements, or owned the entire interest; that the reversal of the decree by the Supreme Court was upon technical grounds, and that they are entitled, *ex æquo et bono*, to retain the sum so received in part execution of the decree, notwithstanding the reversal. They further rely upon the statute of limitations, as having perfected a bar to the claimant's demand, and insist upon several grounds of demurrer, viz., 1st. That the bill contains no equity; 2nd. That

complainants' remedy is adequate at law; and 3rd. Because no foundation is laid by the bill for the process of attachment.

Several witnesses were examined on each side, and the depositions of two excluded against defendants, but as their testimony is substantially set out in the opinion, it is not deemed necessary here to state it.

Upon the hearing the Chancellor decreed a reference to the master, to ascertain the amount paid under the execution against Clements' estate, which was reported at $2,600 80, and the interest $2,635 80, making the total $5,236 60, and for this sum he confirmed the report, and ordered that, unless it was paid in thirty days from that period, the register of the court "sell the separate estate of the said defendant, Mary E. Crocker, as set forth and described in the marriage contract attached to the original bill in the cause, or so much thereof as should be sufficient to pay and satisfy said debt and costs."

To reverse this decree, the defendants below sue out this writ of error, and here assign as grounds for annulling it:

1st. That the court erred in decreeing that the defendants should pay the amount reported into court, or that the register should sell the separate estate of Mrs. Crocker as set forth in the marriage contract, for debt and costs;

2nd. In not dismissing complainants' bill at the hearing;

3rd. In entertaining said bill or taking any proceedings, as it had no jurisdiction of the claim sought to be asserted;

4th. In over ruling the demurrers to the original, amended, and bill of review;

5th. In holding that the proceedings were warranted by the statute and the rules of equity pleading;

6th. In excluding the depositions of Garrow and Tatum;

7th. In allowing interest;

8th. In referring the matters of account to the master, and in confirming his report; and

9th. In not decreeing for the defendants below, and each of them, on the merits.

Geo. N. Stewart, for plaintiffs in error:

1. The bill is demurrable, because the demand is not an equitable one, but a legal demand for money had and received, suable and recoverable at law, whether due by the husband alone or

by husband and wife, and whether the defendants are residents or non-residents.—5 Stew. & P. 119; 7 Ala. R. 484; 18 *ib.* 405; 21 *ib.* 340; 6 Cowen 287; 1 H. & John. 405. The non-residence of the defendants cannot give chancery jurisdiction; an attachment at law would lie as well, as the claim is an ascertained demand for a sum certain.

It is said that it is necessary to go into chancery to reach the separate estate of the wife in the hands of the husband as trustee. We deny that the wife's separate estate is liable at all to this demand. The debt being a simple debt, due by implication by the wife before her marriage, the effect of her marriage was, to merge her existence in that of her husband; it became his debt, and no longer hers. It is true, the suit would have to be brought against husband and wife, because, if not collected of him during the coverture, it might survive against the wife; but that does not alter the case pending the coverture: it was the sole debt of the husband, and still is, if a debt at all.—See Forrest v. Robinson, 4 Porter 44; Clancy on Husband and Wife, 331 to 346. The bill is defective in its allegations; there is no averment that any judgment was recovered against the husband, nor that he is insolvent, nor that he had not property in the State sufficient to pay the debt.

2. The bill was not filed in due time. The defendants' retainer of the money has been acquiesced in between eleven and twelve years. The claim now comes too late, even if there were an express promise and an acknowledged debt. Unless the bill shows that the demand is prosecuted in due time, it is objectionable on demurrer.—Angell on Limitations 320. The case cannot be assimilated to a debt acknowledged to be due, or promised to be paid. It is true the decree was reversed; but the reversal was on mere technical grounds, not affecting the merits of the demand. The master's report on the reference, showing the amount due to complainant, stood unimpeached, and if the pleadings had been proper, the decree would have stood. The only defence set up by Clements to the bill, was, that Theron Kellogg had conveyed the land to him; he did not even aver that the land was his at the time of Kellogg's death. This defence he utterly failed to prove, and it never has been established. The amount recovered under the decree was less than the complainant claimed. It may have been wise policy in the

defendant to acquiesce in her retaining what she had got, rather than renew the controversy at the risk of losing more. The retainer was under a claim of right; no demand was made after the reversal, and no denial of that right. The claim is now made, after Clements' estate has been fully distributed, after the complainant's claim against him has been barred by the statute of limitations, and after her witnesses are dead. While she retained the money, claiming a right of retainer, she could not sue for and recover it again. The acquiescence for six years, as it was a legal demand, made it hers. Her right of action during that time, while she was in possession, was extinct.

3. The claim is barred by limitation, so far as this particular action is concerned. The bill was filed more than six years after the cause of action accrued. The complainant charges that the defendants left the State in 1842, but he files his bill against them, as non-residents, more than six years after that time. The process could have been sued out against them, as such non-residents, as well in 1842 as in 1851, and every day during the intermediate time. In chancery there is no positive bar by statute; but chancery holds claims barred by analogy to the statute governing them at law. It is the policy of the statute—the reason of the law—that governs courts of chancery. The reason of the statute of limitations operates on complainants, not defendants: it is to require claims to be prosecuted before the proof is lost or difficult. The exception as to absent defendants is allowed because the plaintiff could not sue during such absence. But that reason does not hold here, as the complainant might have sued out this process every day during the six years. *Cessante ratione, cessat etiam lex.* If this demand had been sued at law, it would have been barred; it is equally barred here, because the law will not allow a money demand to be prosecuted, in any form of action, after the lapse of six years, when it might have been prosecuted every day during that time. It cannot be contended, that if a debtor absents himself from the State, leaving property to be seized, this property is never protected from suit. What is the limitation to such an action? These are the very cases which should be rigorously watched, as they are most liable to be abused.

4. The objection of the statute of limitations arises in anoth-

er form, upon the facts disclosed by the bill, answer and proof. Mrs. Crocker left the State in January, 1845, returned in November, 1848, but was in Mobile four or five months during the intermediate period, and left again in June, 1849. Whether she was in the State full six years, depends on the manner of counting the months: excluding both months named, the full period had not elapsed; but including them, it is complete.—How is the statute to be construed concerning absent periods? The successive periods of absence cannot be added together cumulatively to make the period of residence less than six years. The construction as to exceptions in the statute has always been very rigid, when the statute has once commenced to run.—See Cole v. Jessup, 2 Barb. S. C. R. 313 to 315; Randall v. Wilkins, 4 Denio 577. Only the first period of absence can be counted against us, and consequently the bill is barred as to Mrs. Crocker; and when a bill, filed against two jointly, is barred as to one, it cannot be maintained at all, for a joint cause of action must be shown to exist.

5. The decree was erroneous on the merits of the case. The bill alleges that the defendants have no legal or equitable right to retain the money sued for, and without this allegation it would be defective. The answer positively denies the allegation, and asserts an equitable right of retainer. It is insisted that the evidence sustains the answer, and makes out a complete defence. (Mr. Stewart's argument on the testimony is necessarily omitted, as it could not be condensed within the compass of a brief.)

6. Interest ought not to have been allowed, as there was no demand after the reversal of the decree. While the money was retained, the defendant in error was protected from an action for the same debt. The reversal being on a technical defect, until this condition of things was determined by a demand or suit, the parties stood mutually consenting. The complainant cannot, after eleven years' acquiescence in our possession of the money, for which he had all the time a corresponding protection from suit, and when our suit is now barred by limitation, be allowed to come and elect to claim the money and interest during the long period of delay. It was in the power of complainant to disavow our claim to retain the money in satisfaction, *pro tanto*, of our demand. Until demand or suit, no election is made, no

default exists, no interest accrues. The mere delay in this case, under the circumstances, is sufficient to prevent the allowance of interest by a court of chancery.

J. C. Bolling, *contra:*

1. The statute of the State makes all equitable titles to land subject to the payment of debts, by process in a court of chancery.—Clay's Digest 350 § 31; and the act of 1846, giving attachments in chancery, authorizes the mode of proceeding adopted in this case. It was not necessary to exhaust our remedy against the husband, before proceeding against the wife.—17 Ala. 787.

2. The statute of limitations is no bar to the suit, as the husband, who was the party liable to be sued at law, has been absent from the State.—Smith v. Bond's Heirs, 8 Ala. 386. Nor can the time of the wife's return to the State be computed, so as to make six years, because the time is stated in the amended answer in the alternative, and if either party is to be prejudiced by such a mode of statement, it must be the party who pleads in that way. Besides, the defendant, if he relies on an exception, in order to make out his technical bar, must state the facts and circumstances with clearness and distinctness.—Angell on Limitations 320, and authorities there cited. Courts of equity only apply the statute when the party would be barred at law.—*Ib.* 25, 26.

3. The money cannot be retained, unless the defendants show an ascertained and liquidated demand. Their right, as set forth in the answer, if any such ever existed, is a mere right to call us to an account, to do which, they must become actors in a suit for that purpose: they cannot, in this suit, ascertain what may be due them, and apply the money which they have unjustly recovered to its payment.—1 B. & A. 664; 7 Ala. 307; *ib.* 484.

4. The amount we sue for is not an open account.—8 Porter 230; 1 Ala. 63; 10 Wend. 354.

5. We have been in the adverse and exclusive possession of the land for more than thirty years. If they were tenants in common with us, their right would be barred in twenty years, and they could not call us to an account for more than six years back.—4 Yerger 104; Angell on Limitations 465, 466.

6. The decision of the court below on the merits was correct.

7. The court will bear in mind, that it is the separate estate of the wife, secured to her through a trustee; that the money was received by her while a *feme sole;* and that, without the aid of the statute, we would be allowed to proceed as we have done, as the wife's separate estate could not be reached by any process at law.—10 Ala. 291.

8. The mortgages to Clements and to Kennedy were properly admitted in evidence, as they are explanatory of Clements' possession and the character in which he held the lands.—1 Green. Ev. § 109; Angell on Limitations 464 to 466.

CHILTON, C. J.—1. We shall first examine the questions raised upon the demurrer to the bill. It is insisted that the demand sought to be recovered is legal merely, and constitutes no charge upon the separate estate of Mrs. Crocker, but is recoverable at law, by suit against husband and wife, out of the effects of the husband; that, being the debt of Mrs. Crocker *dum sola*, it became the debt of her husband upon the marriage, and no longer hers, and that it therefore constitutes no charge upon the estate which is secured to her sole and separate use by the marriage contract. It is further contended that the liability of the wife, if any exists, is only an implied undertaking to refund the money which she has received, and that no equity attaches in virtue of such liability upon her separate estate.

In England, there appears to have been some contrariety of decision upon the question as to what kind of pecuniary engagements on the part of the wife shall be considered as amounting to an appointment of her separate property for its satisfaction; but, with respect to demands arising under circumstances from which the law would imply a contract, it seems to be well settled that they do not attach upon her separate estate.—Bolton v. Williams, 2 Ves. Jr. 150; Jones v. Harris, 9 *ib.* 486; Aguilar v. Aguilar, 5 Madd. 414; 2 Roper's H. & W. marg. p. 241 n. a.; *ib.* 22, Law Lib. top p. 1434; Clancy's Rights of Married Women 331 to 346. The same doctrine seems to be countenanced by this court in Forrest v. Robinson, 4 Por. 44. Conceding, however, such to be the law in this country, we do not think the principle applies to the case before us. This property was subject to this demand before the marriage con-

tract was entered into, and the effect of the contract is, to reserve the property to the wife, or, in other words, to exclude the marital rights of the husband, and prevent them from attaching to it.

Although the claims of creditors are never considered an objection to the execution of marriage articles, unless they are creditors by judgment or other matter of record, so as to constitute a lien upon the property before the articles were entered into, and notwithstanding marriage is in law deemed a valuable consideration to support such ante-nuptial contract, nevertheless, when the debtor makes the settlement in anticipation of marriage, or declares a trust, not for the benefit of another, but in her own favor, and to her sole and separate use, she retains it after the marriage, in the view of a court of equity, as though she were sole. It is unaffected by the marriage, and must be considered liable to her previous debts.

True, the husband, upon the marriage, by the common law, became immediately bound for the debts of the wife, whatever might be their amount, and this irrespective of whether he obtained any property by her or not: he is said to have adopted her and her circumstances together.—1 Bla. Com. 443; but, although he becomes charged with her debts, the wife is not by the marriage released from them. The coverture protected her from personal execution, but this protection was afforded only in cases where she has no separate estate.

It appears to be well settled by the authorities. that aside from the statutes exempting the person of the wife from arrest, upon civil demands, both she and her husband might be taken in execution, and when so taken, she was not entitled to her discharge, unless it was made to appear to the court that she had no separate property out of which the demand could be satisfied.—Tidd's Pr. (9 Ed.) p. 1026; McQueen H. & W. 40; Sparks v. Bell, 8 B. & C. 1. These authorities show, that, even at common law, the separate property of the wife was made liable to satisfy her prior debts, in cases where it was in the power of that court to reach it. But our statute, exempting the wife from imprisonment for debt, effectually takes away the power of the common law forum thus to afford relief.

The remedy here pursued is, however, clearly given by the act of 5th Feb. 1846, (Pamp. Acts '45—6, p. 17,) authorizing

a bill in chancery against non-resident debtors, upon simple contract demands, to subject either a legal or equitable interest in real or personal estate, to the payment of such demands, upon making affidavit as to the facts of indebtedness and non-residence of the defendants; and the sheriff is to be authorized by process, in the nature of attachment, to take into his possession personal property of the defendants, repleviable on security, in such manner as the judge granting it may direct, sufficient to satisfy the claim. The required affidavit accompanies the bill in the case before us.

As this act confers the remedy, and the effect of the marriage settlement is not such as to exempt the property which the wife reserves to her sole and separate use from liability to demands existing against her when the settlement was made, it follows that the plaintiff is entitled to the relief which he seeks, unless he should be defeated upon some other ground. We therefore turn to the second objection to the granting of relief, which is—

2. That the bill was not filed in due time, and that the retainer of the money has been acquiesced in too long to be disturbed at this late period.

Before proceeding to consider the facts, we premise first, that the remedy here pursued being concurrent with the legal process of attachment, the same limitation which would have been applied had the suit been commenced in the common law forum, should be applied in equity. This is a familiar doctrine.—2 Story's Eq. Jurisp. § 1520; Angell on Lim. 25—6.

In the next place, we premise that the action in the case before us accrued, if at all, upon the reversal of the decree by the Supreme Court, under which the money was collected by Mrs. Crocker; for until the decree was annulled, she had a right to the money which she had collected under it, and no action could have been maintained against her for its recovery.—In the third place, we feel constrained, in making an application of the legal statute of limitations, to carry out the analogy which obtains between this and the common law court, as to the exceptions and qualifications with which it would have been applied in the latter forum; for we should violate the spirit of the statute just as much by making an application of it without these, as to refuse to regard it at all.—Demarest v. Wynkoop, 3 John's Ch. R. 129; Angell on Lim. 27. We must, there-

fore, exclude from the computation the time the defendants were absent from the State, as the statute requires that "the time of such persons' absence shall not be accounted, or taken as part of the time limited by this act."—Clay's Digest 327, § 84. Under this clause of the statute, it has been decided by this court, and we think correctly, that the debtor must have been within this State, subject to be sued, during the whole period prescribed as a bar, but that this need not have been continuous. He may add together the different portions of time, so as to complete the period fixed by the statute.—Smith, adm'r, v. The Heirs of Bond, 8 Ala. 386. Applying these principles to the case before us, we have but little difficulty in arriving at a correct conclusion. The bill was filed on the 16th May, 1851, and the decree of Mrs. Crocker, then Miss Kellogg, against the administrator of Clements, was rendered at the January term of the Supreme Court, say the 1st of January, 1840. She left the State in January, and her husband in March, 1845, and she returned and remained in it four or five months after that time; so that they could not have been in this State more than five years and eight or nine months, from the time the cause of action accrued.

But the bar is not made out, even dating the cause of action from the time when the sheriff collected the money—the 8th of August, 1849—unless we say that Mrs. Crocker, when she returned, remained *five* months. She says she remained *four or five*, and stating the time in the alternative, her answer must be taken most strongly against her. We must, therefore, take the shorter period of four months, in the absence of proof of any longer time. In either aspect, therefore, the plaintiffs in error can derive no benefit from the statute of limitations.

But it is argued, that the plaintiffs in error are barred from again renewing the suit against Clements' estate, and although the statute of limitations may not in strictness protect them, yet a court of equity will regard the delay in bringing this suit as an acquiescence in the demand, on the part of Clements' administrator, at least to the extent of this payment. We need only say, in reply to this argument, that the want of mutuality in the bar is the result of the voluntary non-residence or absence from the State of the plaintiffs in error, by which they bring themselves within the exceptions contained in the statute;

and we are aware of no rule of equity which would justify us in refusing relief, by reason of delay, in such a case as this, where the statute of limitations would not constitute a bar, had the remedy been sought at law instead of in this court. Neither have we seen any case which takes a distinction between implied and express promises to pay money, as respects the application of the statute.

But we have said enough upon this point, and proceed to consider the case upon the merits. We agree with the Chancellor, in holding that the reversal of the decree which Miss Kellogg had obtained against Clements' administrator, rendered it null and void, and this, with the subsequent abandonment of the suit, whereby it was dismissed for want of prosecution, entitled the administrator of Clements, *prima facie*, to recover back the money which had been collected in virtue of such decree, and clearly casts upon the plaintiffs in error the burthen of showing an equitable right to retain it, notwithstanding such reversal and subsequent dismissal of the bill for want of prosecution. It is true, the reversal was had upon technical grounds; but the decree was nevertheless annulled, and if the complainant had a meritorious ground of complaint, that should have been shown when the cause was remanded in the primary court; but it was not done, and the prosecution was abandoned. This, *prima facie*, concedes that nothing was due, and, as we have said, devolves on the plaintiffs in error the necessity of showing the right of retainer.

The counsel for the plaintiffs in error relies upon the fact, that Clements, in his answer to the original suit, admitted that Kellogg had at one time a joint interest in the land, but set up, by way of avoidance, that he had sold and conveyed the land to him, Clements, for $2500, by deed of conveyance bearing date the 9th of Dec., 1816, which deed he proposed to exhibit, &c. It is said this deed was neither then shown, nor has it ever come to light since; and it is insisted that, inasmuch as Clements' answer set it up as affirmative matter in avoidance, it was incumbent on the defendant in that case to sustain it by proof.—Now, conceding that this position would have been correct, if taken in that case, we do not think it applies to this; for here, the parties are reversed. We are not called upon to try that case, and determine the effect of the answer of Clements, a

subserving the double purpose of pleading and proof. In this case, we are to consider it as proof merely, and thus considering it, so far as its allegations are pertinent to the matters in issue, they must be regarded as proof, whether strictly responsive or affirmative merely. In other words, if the plaintiffs in error desire to make it proof, the whole answer, if pertinent, must be taken together.—See Saltmarsh v. Bower & Co., 22 Ala. 221, and cases there cited.

The complainant in the court below, upon the production of the record of the decree, its reversal, and the abandonment of the suit by Miss Kellogg, and proof of her receipt of the money, made out a *prima facie* case, and satisfied the averment in the amended bill, that the defendants had no right to retain the sum so received. If the defendants had the right of retainer, this being an affirmative fact, and within the knowledge of the defendants, it was incumbent on them to set up such right in their answer, and sustain it by proof. They have averred it, but have they proved it? We give them the benefit of the position taken by their counsel, that after the lapse of so long a period, they should not be held to such strict proof of their right as would be required under other circumstances; and we will further give them the benefit of the evidence which the Chancellor excluded; and considering the case in the most favorable light for them, we think the record fails entirely to establish in them an equitable right to retain the money.

This brings us to a consideration of the proof taken in the cause, and which is subtantially as follows:

For the complainant in the court below three witnesses were examined: Augustine Demmy deposes that soon after he became acquainted with Joshua Clements, in 1814, the latter removed from Mobile to the middle fork of Dog River, called Grand Bayou, where he was erecting a mill called Clements' Mill; that before its completion, Clements took Kellogg into copartnership with him, and they finished it together, and became part owners of the mill and land belonging to it, which was called the mill tract, under the firm of Clements & Kellogg; that some years after the mill went into operation Clements bought Kellogg out, the firm was dissolved, and Clements became the sole possessor of the mill and mill tract, which comprised about twelve hundred acres; that said Clements continued to occupy the premises unin-

terruptedly, down to the period of his death, with the exception of two years, when he had conveyed to Johnson and Beardsley, but after said conveyance he became re-possessed, and died in the possession, and his heirs have since occupied it. He does not recollect the time when Clements bought of Kellogg, but says it was notorious that he did purchase his entire interest. Witness never saw any deed conveying such interest, but lived where they had the mill, was intimate with both Clements and Kellogg, and heard them both talk over their business together.

William Grelat testifies, that Joshua Clements removed upon the premises and commenced the erection of the mill some three years after the close of the late war with England; that he claimed the premises in his own right; that he occupied the same until his death, and that Kellogg, from whom he claimed to have purchased the premises, lived on some land adjoining the mill tract, down to the period of his death, but witness does not know whether he claimed to own it or not; never heard any one make claim to the mill but Joshua Clements.

Graham Davenport testifies, that he became acquainted with Clements in 1818; he was then residing in the vicinity of Mobile; purchased lumber from Clements, though he never was at the mill, which was known as Clements' Mill; remembers that Clements and Kellogg were in co-partnership in the mill, but does not know whether Kellogg had any right or title to the land; the partnership was dissolved; Kellogg left Clements, and died. Witness does not know whether Clements purchased out Kellogg or not.

On the part of the defendants in the court below, Mrs. Ogden testifies as to their residence for several years past, but says nothing respecting the merits of the controversy.

The deposition of S. H. Garrow was taken in the case of Miss Kellogg against Clements, and was excluded by the Chancellor. This witness testified, that Kellogg died in 1820, and was at the time of his death the owner and occupant of a tract of land in Mobile County with a mill situated thereon, on Dog River, about nine or ten miles from Mobile, and containing six hundred and forty acres; that at one time it was owned by Clements and Kellogg, and the latter sold his share to Clements, but afterwards re-purchased the whole tract back from Clements. The witness states, that he obtained a knowledge of these

facts from conversations with both Clements and Kellogg. He further states, that the land and mill were afterwards sold by him, the witness, as administrator of Kellogg, under an order of the Orphans' Court, and Clements became the purchaser, but refused to complete the purchase, because Mrs. Kellogg would not relinquish her dower; that Clements occupied the land, and used the timber making lumber, from 1824 until the period of his death, which happened in 1833.

The witness, Tatum, whose testimony as taken in the original cause the Chancellor also excluded, merely proves, that Clements occupied the premises and used the mill from the time Kellogg died until he, Clements, died, and thinks that the annual net income of the mill should have been twelve hundred dollars.

Two deeds of mortgage were introduced by the complainant in the court below, one dated 23d May, 1821, signed by Joshua Clements, Ebenezer Johnson and Cyrus Beardsley, to Joshua Kennedy, to secure the payment to the latter of $2,794, due one year after the date of said deed, and in which mortgage it is recited. The land is described as situate on Dog River, and containing six thousand four hundred arpents, and was granted to George Tucker by the Spanish Government, by him conveyed to Joshua Kennedy, and by the latter to Clements and Kellogg. The other deed bears date the 5th November, 1821, and is made by Ebenezer Johnson and Cyrus Beardsley to Joshua Clements, for one undivided moiety of the same land, in which it is recited that said land is the same conveyed by Joshua Kennedy to Joshua Clements and Theron Kellogg in 1814, and the undivided half of which was since sold by the said Kellogg to said Clements, and since, viz., on the 17th January, 1820, sold by said Kennedy to said mortgagors. This deed was made to secure the payment of $5000 in yearly installments of one thousand dollars each year, the first to fall due the 17th January, 1821, and further to secure the payment of one half of a certain note given by Clements and Kellogg to Joshua Kennedy, as the purchase money for said lands, and to pay one half the costs and charges of what the parties might thereafter have to pay in the event the United States should refuse to confirm their title and the land should be sold.

The defendants below read the deposition of W. Ogden, who deposes, that he learned from conversations with Clements and

Kellogg that they used and occupied the mill until 1820, claiming the same as owners; that Kellogg died in August, 1820, and Clements continued to use said mill until his death, in 1832 or 1833; and that in his opinion the net yearly value was about $500.

This is a synopsis of all the evidence in the cause, and we think that it is needless to comment upon it; for it is very certain that it furnishes no data for a satisfactory conclusion that the defendants have a right to retain this fund. It is said that much of the testimony is illegal and secondary; and this is true, but the objection goes to the testimony on both sides. Concede that the mortgages were improperly admitted, and that the testimony of Grelat is but the declarations of Clements himself, which are not legal evidence, the testimony of the defendants, showing an *ownership* in land and a sale by an order of court by parol evidence merely, is liable to the like objection. Aside, however, from this, and waiving the objection to the testimony of Garrow, as not being relevant to the issue made by Miss Kellogg's bill, the most that can be said of it, when taken together, or of that portion of it which is legal, is, that it shows that Kellogg at one time had some interest in the possession of the mill and claim of ownership as a copartner with Clements. This copartnership in the mill was dissolved, but as to the respective rights of the parties, as growing out of the *title* to the land, neither of them has shown any title, unless, indeed, the continued possession of Clements and those claiming under him has ripened their claim into a title by virtue of the statute of limitations. The only documentary evidence of title is the copies of the mortgages; and if the recitals in these are relied upon to show that the land once belonged to Clements and Kellogg, the same recitals, which must be taken all together, show that the latter (Kellogg) sold out his interest to Clements. As the defendants below insisted on their title, as conferring the right of retainer of the fund received, they should have produced some evidence of it, before the complainant could be required to produce his title and thus to negative the idea of the title being in them or their ancestor. Upon a careful examination and consideration of the proof, we are led to the conclusion that it does not uphold the claim set up by the plaintiffs in error to retain this fund.

The counsel for the plaintiffs in error endeavors to strengthen his case, by relying upon the report of the master made in the case of Miss Kellogg v. Clements, to which no exception was taken; but this cannot be looked to, as affecting the merits of this controversy. The defendant (Clements) might well have reposed upon the objection which proved fatal to the complainant's case, that there was no proof of the allegations of the bill, and have suffered the complainant to proceed *ex parte* as to the reference of the matters of account. Having shown no equity or title to relief, as alleged in the bill, the complainant gained nothing by taking the account, as the report and confirmation of it fell to the ground with the decree, upon the general reversal.

4. Upon the subject of interest we think there was no error. Courts of chancery upon this, as upon the subject of the application of the statute of limitations, follow the law, and allow interest in cases where it would have been recoverable had the suit been instituted in the common law court.—See Hughes' Adm'r v. Standeford's Adm'r, 3 Dana's R. 288, and cases cited; 2 Danl. Ch. Pr. 1440-1. The sum to be refunded in this case was certain, and the law implied a contract or raised a promise to pay it. In such case interest is properly allowed.—2 Danl. Ch. Pr. 1441, n. c; 19 Ala. Rep. 468.

There is no error in the record, and the decree is consequently affirmed.

SMITH *vs.* RORERTSON.

1. When a vendor represents his title to be good, it is equivalent to saying that he has a perfect title to the entire tract, unaffected by any gaps in the chain of title, or any defect or incumbrance whatever.
2. A court of equity will rescind a contract of sale at the instance of the vendee, and restore to him the purchase money which he has paid, whenever the contract is tainted with false and fraudulent representations on the part of the vendor relative to the title; and for this purpose, the whole conduct of the vendor in relation to the matter may be looked to.
3. If the contract is made under a mutual mistake as to the vendor's title, the vendee is entitled to a rescission, if he seeks it within a reasonable

time after the discovery of the mistake, and abandons the possession, delivering or offering to deliver it to the vendor.

4. The vendee's right to a rescission in such case does not depend on his payment or tender of the purchase money, nor upon the vendor's insolvency, but upon his own promptness in seeking a rescission.

ERROR to the Chancery Court of Shelby.

Heard before the Hon. W. W. MASON.

The bill in this case was filed by John Smith against Henry W. Robertson, for the rescission of a contract for the sale of lands. It alleges fraud and false representations as to the title on the part of the vendor at the time of sale, and want of title in the vendor both at the time of sale and at the filing of the bill. It alleges an abandonment of the land by the complainant, and an offer to return the possession, which was refused; also a tender of the purchase money, and a demand of title, both of which were refused. It prays for a rescission of the contract, and a decree for the portion of the purchase money which complainant had paid before his discovery of the fraud and want of title.

The answer admits the sale, but denies all fraud; it also denies that any defect exists in respondent's title, and avers that he has a good title, and is ready to comply with the condition of his bond, and to make to complainant a fee simple title to the lands on the payment of the purchase money; denies that complainant has abandoned the possession, or ever offered to return it to respondent; denies any *bona fide* tender of the balance of the purchase money yet due, and any refusal to make title on full payment being made.

The defendant also filed a cross bill, praying for a sale of the lands to pay the balance due of the purchase money.

There are other matters in the bill, answer and cross bill, which, with the proof in the cause, are noted in the opinion, so far as they are necessary to a right understanding of the case.

On the hearing, the Chancellor dismissed the original bill, and retained the cross bill, decreeing relief on it in favor of Robertson.

The decrees on the original and cross bills are now assigned for error.

Rice & Morgan and B. T. Pope, for plaintiff in error:

A vendor who gives a bond for title on the payment of the purchase money, contracts to make a good title; and if he has not the title at the time of sale, he binds himself to get it within a reasonable time, and certainly by the time the money is paid or tendered.—Smith v. Robertson, 11 Ala. 840; Wellborn v. Tiller, 10 Ala. 311; Young v. Harris, 2 Ala. 311; Griggs v. Woodruff, 14 Ala. 20; Cunningham v. Sharp, 11 Humph. 116; Greenlee v. Gaines, 13 Ala. 198; Camp v. Camp, 2 Ala. 632.

If the vendor cannot make title, no tender of the money is necessary, and a rescission will be decreed without a tender.—Griggs v. Woodruff, *supra*. But in this case, by way of abundant caution a tender was made. It was wholly immaterial whose money was tendered, so it was within Robertson's power to take it, and make it his own. If the money was Allen's, as Robertson avers, he was present, and would thereby have been estopped from disputing Smith's right to tender it.

The vendor must not only have title, but he must exhibit it when disputed, that the court may be able to pass upon it.—Cunningham v. Sharp, 11 Humph. 119. Robertson not only does not show title, but his own witness, Moore, shows that the title to over one hundred acres is not in him, but in Aaron Castleberry, with whom Robertson does not pretend to have any connection whatever; and to another tract of forty acres, the title is not shown to be out of the Government. If the title to this last tract had ever passed out of the United States, it could have been shown by a certified copy of the patent; the fact that it is not shown, raises the presumption, if it is not conclusive evidence, that the patent has never issued, or has issued to some one else than Robertson or his vendors.

If there was fraud, it was not necessary to abandon the possession.—Read v. Walker, 18 Ala. 331. But Smith did abandon possession in 1843, after having offered to rescind, as soon as he discovered the fraud and want of title.

No offer to rescind, or offer of possession, is necessary, when the defendant, by his answer, shows that it would not have been accepted.—Elliott v. Boaz, 9 Ala. 772; Griggs v. Woodruff, *supra*. But Smith offered to rescind, offered possession, and abandoned possession himself.

The fraud shown, and Robertson's continued inability to make title, are principally relied on for a decree.

As to defects in the assignment of dower, see the authorities collected in 2 U. S. Digest 40 § § 342 to 374.

WHITE & PARSONS, *contra :*

1. This record, it is believed, on a careful examination, will show facts sufficient to sustain the Chancellor's decree.

2. This court will "refuse to rescind a contract, where it will not specifically enforce it."—Beck v. Simmons, 7 Ala. 71; Burke v. Park, 16 Ala. 548.

The true question, therefore, is not whether the complainant should be compelled to accept this title; but whether he should have the contract set aside. A vendee wishing to rescind must pay, or offer to pay, the money according to contract, and if the vendor refuses to make title, he must offer to return the possession.—Duncan v. Jeter, 5 Ala. 604; 3 Ala. 40; and he must act promptly and decidedly, upon the first discovery of the cause for rescission.—Griggs v. Woodruff, 14 Ala. 16.

The complainant has not done this. He does not allege, with any degree of clearness, when he first ascertained the defect of title; but it does appear, by his bill, that he permitted a portion of the purchase money to be collected out of him, after he knew of the pretended fraud.

3. There is nothing in the bill, answer or proof, which shows that Smith relied on any assertion made by Robertson concerning the title. He charges, that he had no suspicion of the title, and that he was told by Robertson that he had the title. It is not pretended that Robertson, by any device, evaded an exhibition of his title; he was, at most, simply and honestly mistaken. In this case the ability of Robertson to make the title could have been ascertained, by calling on him to exhibit his title. This the plaintiff did not do. "His failure to do so, is chargeable only on himself, and is a want of that common and ordinary diligence which a court of chancery always requires in cases like the present, before its aid can be obtained."—Steele v. Kinkle, 3 Ala. 358; also 9 Ver. 368, Richardson v. Boright.

4. The respondent is solvent; able to respond in damages the payment of the money if he fails to make title. This, therefore, is another reason why equity will not grant relief.

5. The contract was made in February, 1838; and the pretended tender was not made until June, 1848. Is this such diligence as the law requires of those who seek relief from their contracts? But we insist this was not a *bona fide* tender of the money. The bill states as little as possible in relation to it.—The answer is full, and is sustained by the testimony of Autry.

6. The answer of the respondent is evidence for him. It is responsive to all the material allegations of the bill, and unless overturned by two witnesses, or one with strong corroborating circumstances, must prevail.—Smith v. Rogers, 1 S. & P. 317.

7. The testimony of Allen was properly excluded; and Sims, the other witness, was drunk. The witness Autry sustains the answer throughout; and if Allen's testimony is considered, the weight of evidence is in favor of the bill.

8. The attention of the court is especially invited to a careful examination of the title, which Robertson insists is good.—The bill makes the attack upon the land held under Harden. The title of Robertson to this has already been passed on.—11 Ala. 841.

LIGON, J.—The complainant in the original bill seeks a rescission of the contract on three distinct grounds: first, on account of fraud on the part of the vendor; second, defect of title; and, third, because the vendor, on a tender of the purchase money and a deed of conveyance for the premises, refused to accept the one, or to execute the other.

It is perfectly clear that, where a contract is tainted with fraud, it is void, and when it is ascertained that such is its character, it will be set aside in equity, at the instance of the party injured by it.—2 A. R. 571; 13 A. R. 198.

It has been also held, that where one sells land, and binds himself to convey to the purchaser a good title, the vendee is not bound to accept an encumbered or defective one; and when it is shown that the title of the vendor is defective or encumbered, and he fails or refuses to cure the defect or remove the incumbrance, the vendee may come into a court of equity, and rescind the contract; and in such case, a tender of the purchase money and demand of title, is not necessary to entitle him to his relief. Griggs v. Woodruff *et al.*, 14 A. R. 9. It is immaterial whether the vendor is solvent or otherwise, if the contract with respect

to the title is not fully executed by the making of a deed with covenants of warranty. A court of equity, for the double purpose of protecting the vendee from being compelled to accept a title which is shown to be defective, and to that extent valueless, and to prevent circuity of action or a multiplicity of suits, will interpose for the relief of the vendee.—Newell v. Turner, 9 Porter 420. It would be, indeed, a useless act, for a court of equity to refuse relief in such cases, when it is evident that the only result of such refusal would be, to compel the vendee to pay out his money and accept the conveyance of a title, valueless to himself, and wholly different from the one for which he had contracted, and force him to an action at law upon the covenants of such conveyance, when it is manifest, that these covenants were broken before they were made, and the suit would only delay him in obtaining the redress, to which he is clearly entitled under his contract with the vendor.

But this rule is applicable only to contracts which are executory in their character; if the vendee has accepted a conveyance, he must be left alone to the covenants contained in it for his indemnity against fraud or failure of title, and in such case his remedy is at law, and not in equity.

So, also, if at the time the agreement to purchase is made, a mistake of the true state of title exists with both parties, and, in consequence of such mistake, the vendor makes such representations with regard to it as to induce the vendee to purchase, this, without the intervention of actual fraud, will authorize the vendee, when the mistake is discovered, to disaffirm or rescind the contract, if the mistake be injurious to him; especially, when it is evident that the terms of the agreement would have been essentially different, had the true state of facts been known to the vendee at the time he entered into it.—Daniel v. Mitchell, 1 Story's Rep. 172; Gillespie v. Moore, 2 Johns. Ch. Rep. 596; 5 *ib.* 175; 6 *ib.* 255; 2 Cowen 133; 6 Munf. 283.—But, we apprehend, the injured party must, in such case, after the discovery of the mistake, act promptly, or within a reasonable time, in offering to rescind, and abandoning the possession; else, he will be held to affirm the agreement, notwithstanding the mistake.

It has been also held, that although there may be no actual fraud in making a contract, yet a total inability in one party to

fulfil it, discharges the other, and a court of equity will annul a contract which the defendant has failed to perform, or cannot perform on his part.—Bullock v. Bemiss, 1 A. K. Marsh. 434; Skillern's Ex'rs v. May's Ex'rs, 4 Cranch 137.

A vendee who contracts for a good title, will not be compelled to accept a defective or encumbered one; and if it appears the land is subject to a claim for dower, it is an incumbrance which the vendor must remove before he can compel the vendee to accept a title.

In such cases, it would be unjust to force an encumbered title upon a vendee, even if it were apparent that by the institution of a suit the incumbrance could be removed.—Griggs v. Woodruff *et al.*, *supra.*

If, under an executory contract for the sale of lands, the vendor agrees to make to the vendee a fee simple title on the payment of the purchase money, and no fraud or mistake has intervened, for which a rescission of the contract would be decreed, he cannot be compelled to make the conveyance of title, until the purchase money is paid or tendered. But if, upon the tender of the purchase money, he refuses to receive it and make the conveyance, it will be considered an abandonment of the contract on his part, and the vendee may, if he think proper, also abandon it, and go into a court of chancery to have it rescinded, and on such rescission to recover back the money he had paid before such abandonment.

Let us apply these general rules to the case before us, and see what will be the result.

It appears from the pleadings and proof, that Robertson sold the lands in dispute to Smith, and represented to him at the time of the sale that he had a good title to all the parcels which compose the tract. On these representations Smith purchased, gave his notes for the purchase money, and took from Robertson a title bond, conditioned to make him a fee simple title to the lands enumerated in it, on the payment of the purchase money. This sale was made on the 17th day of February, 1838, and the last note for the purchase money became due and payable on the 1st day of January, 1841. It also appears that Robertson derives his title from one John Harden, through a mortgage, with power of sale, given by Harden to him, and that the sale from Robertson to Smith was made before any public sale had

been made under the mortgage. This mortgage does not, in terms, require a public sale, but invests Robertson, the mortgagee, on the happening of certain contingencies, which are here shown to have happened before the sale to Smith, with full power "to sell and make titles" to the lands conveyed by it, which are the same, with the exception of one tract, that are involved in this controversy. Robertson, then, had full power to dispose of these lands at the time he contracted with Smith, and his conveyance would be good against Harden, the mortgagor.—Smith v. Robertson, 11 A. R. 840.

Robertson admits in his answer that he represented to Smith, at the time of the sale to him, that he (Robertson) had a good title to the lands sold, and still insists that his title is such as he bound himself to convey, viz., a title in fee simple to all the lands sold.

It now becomes necessary to ascertain the title of Harden to the lands conveyed by him to Robertson, in order to see whether this representation was true or false, for it does not appear that, at the time of the sale to Smith, Robertson had any other title than that which he derived from Harden under the mortgage. With his answer, Robertson sets out the claim of title, with the patents and deeds, on which he relies to make good the truth of his representations to Smith. And here it may be as well to remark, that where one represents his title to be good, it is equivalent to saying that it is perfect, and unaffected by gaps in the claim of title under which he holds, or any defect or incumbrance whatever. In other words, it is equivalent to an assurance to the purchaser that, if he buys, he will acquire a title to the entire premises sold, to no part of which another has any just or legal claim, and one on which he may quietly repose.

The tract of land sold by Robertson to Smith consists of several parcels, or legal sub-divisions as they are generally described in the land offices of the United States. No boundaries are given of either the parcels, or the whole tract. In the title bond they are set out as being fractional section 12, township 18, of range 3 east in the Tuskaloosa Land District; the N. E. fraction of section 11; the S. W. ¼ of the S. E. ¼ of section 2; the N. W. ¼ of the S. W. ¼ of section 2; the N. W. ¼ of the S. E. ¼ of section 2; the S. E ¼ of the N. W. ¼ of

section 11; the N. E. ¼ of the N. W. ¼ of section 11; all in township 18, range 3 east, containing in all about three hundred and ten acres.

As to the first and second of these parcels, it is shown by the proof that they were patented to Everett B. Moore, who deposes that he sold and conveyed them to one Aaron Castleberry. These two parcels were conveyed to Harden more than a year after the sale from Robertson to Smith, by Stephen H. Castleberry and wife, by deed bearing date the 19th day of February, 1839. This deed was attested by two subscribing witnesses, and consequently would have been sufficient to pass the dower right of Mrs. Castleberry to the grantee, if the estate of her husband in the lands had been such as to entitle her to dower.—Clay's Dig. 174 § 10. In such case, there is no necessity for any private examination before a justice of the peace, to bar the wife's claim of dower. But it is nowhere shown that the title to these lands ever passed out of Aaron Castleberry to Stephen H. Castleberry, or any other person whatever. Where the title to land is once shown to have been in a particular individual, the law presumes it to remain in him, until it is shown to have passed out of him by some legal means; and he who is in possession, and claims in opposition to such title, must show his conveyance, or protect his possession by adverse holding for the period prescribed in the statute of limitations, or such lapse of time that the law will raise a presumption that his holding is under a conveyance which has been lost or destroyed. Harden, however, can receive no aid either from the statute or the legal presumption, as the time during which the title and possession have been out of Moore, the patentee, is too short for either purpose.

These parcels of land contain about one hundred and eleven acres, or more than one third of the whole tract sold to Smith.

Under these circumstances, the only conclusion justified by the record, in relation to these two parcels, is, that the title is still in Aaron Castleberry, if living, or in his heirs or devisees, if dead.

The proof shows that Harden, when he made the mortgage under which Robertson claims, had a perfect title to only three out of the seven parcels which compose the tract sold by Robertson to Smith, and these amount in quantity to only one hun-

dred and twenty acres, and were encumbered at the time of the sale with Mrs. Harden's claim of dower.

She did not join her husband in the mortgage to Robertson, nor did she ever pretend to relinquish her dower to the lands conveyed by it, until the year 1841, three years after Robertson made the representations to Smith, which are charged in the bill to be false and fraudulent.

The remaining parcel, viz., the south-east fourth of the north-west fourth of section eleven, appears from the proof never to have been conveyed to Harden at all. The only deed, or other muniment of title to this tract, found in the record, is a deed from Henry B. Robertson and wife, to Henry W. Robertson, bearing date the 30th of December, 1844, five years after the sale by Robertson to Smith. If the proof in the record is all that exists in relation to the title of this parcel of land, the paramount title still remains in the United States.

From this review of the proof in respect to the titles to the several parcels of land composing the tract sold by Robertson to Smith, it appears, that the former had not a perfect title to a single acre when he made the sale, and at the time of the hearing in this case in the court below, he had not disencumbered or perfected his title to but little over one half the tract sold to Smith.

In connection with this review of title, tedious as it is, we must still advert to the testimony of Enoch Floyd, a witness for the complainant, before we can rightly characterize the conduct and representations of Robertson, made to Smith at the time of the sale, which he admits in his answer, and repeatedly insists they are true. This witness says, that Robertson came to his house in the early part of the year 1838, and told him that he had sold the land he got of Harden to John Smith, the complainant, and showed witness the notes he had taken, and said he had given his bond to make a deed to Smith when the notes were paid. Witness then asked Robertson, if he was not afraid there would be some difficulty in making a good title, as from what he had heard there were some defects in the titles to some portions of the lands. Robertson replied, that, if he had the luck to get all the money for which the personal property and lands had sold, he would pay off all Harden's debts, and have the price of the land left for his (Harden's) wife and chil-

dren; and as to the title, he cared nothing about it, so he got it off of his hands. On witness further suggesting that Harden had showed witness his title, which was an old deed assigned to Harden by some other person, Robertson replied, if witness would keep his mouth shut about it, it would save him (Robertson) some trouble. At the time of this conversation, the witness lived on the land in dispute.

When it is seen, (as it plainly appears from what is proved in respect to the titles of these lands,) that Robertson had not a perfect or unencumbered title to any part of them at the time he sold to Smith, and that, therefore, his representations that he had were false; his anxiety that his tenant should not reveal the defects of the title, and his reckless declaration that he cared nothing about the title, so he could get the purchase money, and this occurring immediately after the sale, the mind is irresistibly impressed with the belief that he knew the defects of title, or at least some of them, and that his representations are not only false, but were made with the intention to defraud his vendee.

While we hold that fraud should never be presumed, yet it is perfectly clear it may be inferred, when the facts of the case will justify it, and the whole conduct of the party to whom it is imputed, in relation to the matter out of which it arises, may be looked to for this purpose; and when this rule is applied to the case under consideration, it is clear to us that the representations of Robertson to Smith, made before and at the time of the sale of the lands, were made to defraud him; and for this reason a court of equity should, when applied to, rescind the contract thus procured, and restore to the defrauded purchaser whatever sum he has paid on account of such an agreement.

2. Conceding, however, that the representations of Robertson are not fraudulent, but were founded in mistake alone, in which Smith also participated, and that at the time the contract was made both parties believed the title to be good and unencumbered, and that their agreement was predicated upon this belief, it does not vary the result of this case. A mistake of this character, if the party who has been injured by it seeks a rescission of the contract within a reasonable time after he discovers it, and delivers, or offers to deliver, the possession of the premises to the vendor, and abandons them himself, will fully

justify a court of equity in relieving the vendee, if the vendor insists upon his contract, and refuses to rescind.

It is charged in the bill, and admitted in the answer, that Smith, after paying a large portion of the purchase money, offered to rescind the contract, but that Robertson refused to do so. It is also alleged in the bill, that the offer to rescind was accompanied by a tender of possession, and immediately followed by an abandonment of the premises by Smith. This allegation is expressly denied by the answer, and the tender of the possession, as alleged, is proved by the testimony of only one witness, while the abandonment of the possession in the year 1843 is fully established by several witnesses.

It does not appear from the record, that Smith suspected the validity of Robertson's title, until sometime in the year 1843, when the latter advertised the lands for sale, under the mortgage made to him by Harden; and one witness deposes, that, on the day of the sale under this advertisement, Smith, in his presence, offered to rescind the contract, and surrender the possession of the lands to Robertson, but the latter refused both offers.

It is contended by Robertson's counsel, that this proof can not be allowed to outweigh the positive denial of the answer; that in such case the law requires two witnesses, or one witness with strong corroborating circumstances; and that the circumstances required do not exist here. While it is fully conceded that, in ordinary cases, the rule of evidence is as it is contended for, yet there is another rule, which, in our opinion, is much more applicable to this answer, than the general one above stated. It is this: that answer which is shown to be false in one material part must be discredited altogether, and is only regarded as a mere pleading. This rule is in strict analogy to the general rule with regard to witnesses. The practice in chancery views the sworn answer of the defendant, when unassailed, in the double aspect of pleading and proof.

The assertion in the answer of Robertson, more than once repeated, that he had a perfect title to the lands in dispute, and that no one else had any title at the time he sold to Smith, is shown to be false by the facts and circumstances herein before stated. We will now examine whether he knew it to be so when he swore to his answer, or whether the falsehood arose out of an

honest mistake as to the character of his title. The sale to Smith was made on the 17th February, 1838, and his answer was verified on the 18th July, 1848. Between these two periods the defendant procured two conveyances, each of which, if rightly made, was indispensably necessary to the perfection of his title. One of these is that of Mrs. Harden, purporting to relinquish her dower in the lands to Robertson; and the other is the deed of Henry B. Robertson and wife to him, purporting to convey the fee simple title to one parcel of the lands sold to Smith, and to which it does not appear that Harden ever had any title whatever. It is highly improbable, if not actually impossible to suppose that Robertson did not know when he took these deeds, that defects existed in his title as it formerly stood, when he sold to Smith, and that they were necessary to supply them; and yet, seven years after the making of one of these deeds, and four years after he procured the other, he positively asserts in his answer that, when he sold to Smith, the title to the land was in himself. His answer in this particular is discredited by the exhibits to his bill, and the whole of it must be regarded as a mere pleading. Having lost its character as testimony, a single witness is sufficient to make good an allegation in the bill, notwithstanding it is expressly denied by the answer.

It is then proved that Smith, as soon as he was induced by the conduct of Robertson to suspect the goodness of the title of his vendor, offered to rescind the contract, tendered him the possession of land, and on his refusal to receive it abandoned it himself. This is all that he is required to do, if his contract was made under a mistake of the facts in respect to Robertson's title, and he afterwards discovered that that title was, in truth, fatally defective. In such cases, the right of the vendee to a rescission of his contract, is not made to depend upon the payment of the purchase money, or even a tender of it, but upon his promptness in seeking a rescission, and placing or offering to place the vendor *in statu quo*. If the latter refuses the offer, or fails to accept it when made to him, this can neither hinder nor delay the vendee's right to abandon the possession and go into equity for relief against the consequences of such mistake. Nor does the solvency or insolvency of the vendor exercise the slightest influence over his right to relief in equity. In this case, it was not even necessary for the vendee to tender the pos-

session to his vendor, as it is clear from the answer that it would not have been accepted.—Elliott v. Boaz, 9 A. R. 772.

3. A third ground of relief, as set forth in this bill, is, that before it was exhibited the complainant tendered to the defendant the balance of the purchase money due, with a deed for the premises in dispute, drawn in conformity with the condition of the bond for titles, and that the defendant refused to accept the one, or to execute the other. It is not, however, necessary to consider this part of the case, and the conflicting proof in relation to it, as we have already seen that the decree of the Chancellor cannot be sustained, and the two points already considered are finally decisive of the case. The decision of this branch of the case either way, cannot vary the conclusion we have attained, or in the slightest degree affect the result to the parties. The tender of the money was wholly unnecessary, and whether it was made or not is unimportant.

The cross bill of Robertson is filed solely for the purpose of enforcing his vendor's lien for the residue of the purchase money, and as we have seen the contract of sale should be rescinded, it is without equity, and must be dismissed.

In the accounting between the parties, the defendant should be allowed a credit for the value of the lands, by way of rent, during the time Smith occupied them.

The decree of the Chancellor dismissing the original bill must be reversed, and the cause remanded as to that bill, that an account of the purchase money paid by Smith, with interest thereon, and of the rents due from him to Robertson, may be taken, and a moneyed decree rendered in favor of the complainant for whatever balance may be found due him.

A decree must be here rendered rescinding the contract for the sale of the lands described in the bill of Smith, and dismissing the cross bill of Robertson, who must pay all cost.

Chilton, C. J., not sitting.

GEORGE ET AL. *vs.* GOLDSBY.

1. The deed of husband and wife leasing the wife's interest in land, unless acknowledged by her on private examination pursuant to the statute, (Clay's Digest 155 § 27,) is absolutely void as to her, and incapable of confirmation, except by acts amounting to a re-delivery.
2. The husband's assignee for valuable consideration is not entitled to the wife's choses in action, as against her surviving, unless he reduces them into possession during the coverture.
3. An executor's assent to a legacy may be inferred from any act or expression on his part clearly recognizing the legatee's present right to receive it.
4. But where the executors and legatees enter into a written agreement with another person, who afterwards takes out letters of administration, by which they transfer the entire estate to him for a term of years, to be by him managed and retained until the debts are all paid, this does not amount to an assent to the legacies on the part of the executors.
5. When an administrator is cited by the Court of Probate to make final settlement, he cannot protect himself by plea setting up a written agreement, entered into between himself and the executors and legatees before letters of administration were granted to him, by which they transferred to him the entire estate for a term of years, to be by him managed and retained until all the debts were paid, and averring that he took possession of the estate and held it under the agreement, and not by the order of the court; such plea is bad on demurrer.

ERROR to the Court of Probate of Perry.

THE defendant in error was cited by the Court of Probate, at the instance of the plaintiffs in error, to make final settlement of his administration on the estate of Anderson Rochelle, deceased. He appeared, and showed cause against the settlement, setting up a written agreement entered into between himself and the executors and legatees of said Rochelle, relative to the estate. This agreemeent is set out at length in the opinion, and need not here be described. The plea was demurred to, and the demurrer overruled.

This ruling of the court, with others unnecessary to be stated, is now assigned for error.

I. W. GARROTT and A. B. MOORE, for plaintiffs in error:

The written agreement relied on by the defendant was executed while Mrs. George and Mrs. Bryant were under coverture,

and it is therefore void as to them. As they did not acknowledge the deed before any officer whatever, it cannot be pretended that the case does not come under the prohibition of our statute. —Clay Digest 155 § 127; Clancy on Husband and Wife 23; 2 Black. Com. 290; 1 N. & M. 33; 2 Reps. Con. Ct. 12; 3 Yeates 471; Walker 322; Wright 205; 7 S. & M. 64; 15 Maine 304; 1 Peters 328; 2 Kent's Com. 168; 7 Johns. 81; 1 Dev. Eq. R. 500; 1 Dev. & Bat. Law R. 34; *ib.* 584; 14 S. & M. 56.

A deed executed by husband and wife, but void for want of proper acknowledgment, will not be made effectual, after the death of the husband, unless by what would constitute a valid re-delivery of the deed, or amount to a new grant by her.—Miller v. Shackelford, 3 Dana 289; Same v. Same, 4 *ib.* 264; Shackelford v. Smith, 5 *ib.* 232; Smith v. Shackelford, 9 *ib.* 452; Campbell v. Holloway, 7 Johns. 81; Vance v. Wells, 6 Ala. 737; 10 U. S. Digest 16 § 28.

Even the acceptance of rent, after the husband's death, under lease made by him, will not amount to a ratification binding on the wife.—Jackson v. Holloway, 7 Johns. 81. And this case further decides, that leases are within the statute relative to conveyances of real estate by married women.

But the plea does not aver that Rochelle's creditors assented to the deed, and the proof shows that they refused to assent to it. It was, therefore, but a power to defendant, not investing him with the title, and was revocable by plaintiffs at pleasure; and they, having demanded the property before suit brought, are not bound by the agreement.—Elmes v. Sutherland, 7 Ala. 262; Kemp v. Porter, *ib.* 138; Lockhart v. Wyatt, 10 *ib.* 231; Dale v. Bodman, 3 Metcalf 139; Williams v. Everett, 14 East 582; 2 Story's Equity 236 § 972; 2 Myl. & K. 492; 7 Ala. 470.

The executor and executrix are parties to the deed in their representative character; it is, therefore, a private sale or transfer by them, which is expressly prohibited by statute.—The law made it their duty to pay the debts of the estate, and to settle it; and any attempt on their part to shift this responsibility, is void.—Clay's Digest 223 § 13; Weir v. Davis, 4 Ala. 442; Dearman v. Dearman, *ib.* 521; 5 Porter 64; Fambro v. Gantt, 12 Ala. 298.

The contract, then, being void as to the executor and executrix, is void *in toto*.—Chitty on Contracts 693; 9 Shepley 488; Story on Contracts 550, 552, 559; 1 Sup. U. S. Digest 58 § 20.

The contract is also void for want of mutuality. There is no valid consideration shown in it. Everything is left in the power of the grantee, the defendant; he may do what he pleases, but can be made to do nothing. The rule of law is, that both parties must be bound, or neither is.—Branch Bank at Huntsville v. Steele, 10 Ala. 915; James v. Stiggins, 13 *ib.* 830.

No point was raised in the court below as to the husband's right to transfer his wife's choses in action; it cannot, therefore, be here considered.

If this deed is sustained, it will at all times be in the power of the representatives to nullify the jurisdiction of the Probate Court over the estates of deceased persons. The statutes give this court jurisdiction and control of estates, and require it to settle and distribute them; while this deed defeats that jurisdiction, or, at least, postpones it for fifteen years.

Wm. M. Murphy, *contra:*

1. The case of Graham v. Abercrombie, 8 Ala. 552, decides that the interest of a distributee in an unsettled estate is the subject of assignment; if one is made, it divests the interest of the distributee.—To the same point, see Wright & Scales v. Love's Ex'rs, 2 Mur. Rep. 354; Powell v. Powell, 10 Ala. 900.

2. Under the will of Anderson Rochelle, deceased, the legacies vested absolutely in his widow, and Ross and Bryant, the husbands of testator's daughters. They had a right to sell, assign, or dispose of in any manner those legacies; and such disposition would bar the right of survivorshop of the wives.—Clancy on Husband & Wife 111, 112, 121, 122, and cases cited; Reeves' Domestic Relations 4; 3 Peere Wms. 197; 2 Atk. 207; 1 V. & B. 405.

3. The executors assented to the legacies, by signing the agreement with Goldsby. This executrix and executor were legatees, their assent indicated by deed, reciting his interest

and granting it over.—2 Lomax on Executors and Administrators 133, and cases cited.

4. As to the question of jurisdiction, this court said in the case of Graham v. Abercrombie *et al.*, on pages 558, 559: "The powers of the Orphans' Court on the subject of the rights of distributees and legatees has concurrent jurisdiction with courts of equity." On page 559 this court deprecates the idea of driving parties to a court of equity. The case cited from 2 Murphey's Reports considers the question of jurisdiction, and concurs with our own court, that the Orphans' Court of North Carolina had concurrent jurisdiction with courts of equity, upon the subject of the rights of distributees; these cases meet and decide this question directly. Upon this point it is suggested that the case of Smith and Loveless, adm'rs, v. Hall, is adverse to the defendant. This case does not overrule the case of Graham v. Abercrombie *et al.*; on the contrary, it quotes the case with approbation to the extent that case proposed to go. On page 782, the judge says: "The cases of Graham v. Abercrombie, 8 Ala. 552, and Petty v. Wafford, 11 Ala. 143, decide *simply* that the assignee of an integral share of an estate may proceed in the Orphans' Court in his own name to obtain distribution." To this extent, and no more, we invoke these decided cases; Goldsby is the asssignee of an integral share of Rochelle's estate. The case in hand does not make "different parties," does not create "partial settlements," does not "split into different portions" the distributive interests of this estate. The case at bar does not introduce to the court new parties; all are subject to the jurisdiction of the court. The parties to this agreement are the legatees and the administrator with the will annexed, all known and subject to the jurisdiction of the Orphans' Court—no stranger assignee or assignees introduced, and the integrity of the estate wholly unbroken.

5. Upon this question of jurisdiction, the court will observe that this trial was had under the "act establishing courts of probate and for other purposes," approved the 11th February, 1850.—See Pamphlet Acts page 24, 1849-50. A comparison of this act with the old law giving powers to the Orphans' Court will discover the increased jurisdiction of the probate court upon questions of fact.—See particularly sec. 8 and 9, pages 26 and 27 of Pamphlet Acts; also the last provision in

section 29, page 33; and section 30 of same page as to writs of error. This increase of power obviates the decision in the case of Willis, adm'r, v. The Heirs of Willis, 9 Ala. 330.

6. The agreement between the parties in this case is a covenant that the estate should not be settled and distributed for the term of ten years, and the execution of this agreement has the tendency to pay all the debts of the estate.

7. This agreement creates an estoppel to a distribution.

GOLDTHWAITE, J.—The facts of this case may be thus stated: Anderson Rochelle died in 1842, leaving a considerable real and personal estate. By his will he bequeathed certain specific legacies to his wife, Nancy Rochelle, and to his two daughters, Sarah E. Ross, wife of James Ross, and Mary Bryant, wife of Thomas Bryant. On the 21st of March, 1842, letters testamentary were granted to the executors named in the will, Nancy Rochelle and James Ross, and on the 22d of December, 1843, sealed articles of agreement were entered into by Nancy Rochelle, James Ross and Sarah his wife, and Thomas Bryant and Mary his wife, (the two first named acting in their representative as well as their individual capacity,) of the one part, and T. B. Goldsby of the other part. The agreement states, as the inducement for entering into the same, that the estate was involved in debt from twenty-three to twenty-five thousand dollars, and that the parties of the first part were satisfied that the entire property would be consumed in the payment of the debts, unless its representatives could obtain pecuniary aid far beyond their means, or the means of the estate; that to save as much as possible of the property they had applied to the party of the second part, who, at their solicitation, had agreed to take upon himself the management of the estate to the best of his ability, to apply the proceeds thereof, including the labor of the slaves, &c., to the payment of the debts, to allow the family of Anderson Rochelle a proper and reasonable amount for their support, to be determined by himself, and from time to time to make such advances as the exigencies of the estate might require, also to be determined by himself; in consideration of which, he was to have the entire control and management of the estate for ten years, and its proceeds for the same term. If during such term the proceeds of the es-

tate were not sufficient to compensate him for his services, and to reimburse him for his advancements, he was to retain the property until these objects were accomplished, such additional term, however, not to exceed five years. By the terms of the agreement, Goldsby was allowed to abandon the same at any time, on giving thirty days notice in writing to the other parties, and, in the event of his doing so, he was to be compensated for his trouble, and repaid his advances.

On the 8th June, 1846, letters of administration with the will annexed were granted to Goldsby. On the 17th November, 1851, James W. Ross having died, and his widow Sarah having intermarried with Elias George, and Thomas Bryant having also died leaving his wife Mary surviving, application was made by the said Elias George and wife and Mary Bryant, to the Probate Court, for a rule against Goldsby for a final settlement of the estate. Goldsby appeared, and showed for cause, by way of plea, the agreement referred to, averring that Sarah Ross and Mary Bryant, after the death of their respective husbands, assented to, ratified, approved and received the benefit of the same; that he took possession of the estate upon the execution of the agreement, and has controlled and managed the same according to its terms, and not by the order of the court; and that by virtue of these facts the estate was not subject to final settlement and distribution. This plea was demurred to, and the demurrer overruled.

The demurrer to the plea presents the question, as to the effect of the agreement as to Mrs. Ross and Mrs. Bryant. At the common law, leases made by the husband and wife by deed, of the wife's estate, were at her election voidable by her after her husband's death; and acceptance of rent by the wife at that period, if the right of election was not before exercised, was held to be a confirmation of the lease.—1 Roll's Ab. 349; Cro. Jac. 563; Bright on Husband and Wife 194. But this rule as to confirmation was not universal, and was regarded rather as an exception to the general disability of coverture, allowed for the advancement of agriculture, and not extending to a joint demise for a long term of years by way of mortgage; and in such cases, it could only be confirmed by a re-delivery of the deed, or acts amounting to a re-delivery.—Goodright v. Strophan, Cowp. 201. The law in relation to leases by the husband and wife, of the

estate of the latter, was changed in England by the statute 32 Hen. 8 Ch. 28; and in this State our statute requires that, to pass any estate of a married woman in lands by her deed, the instrument should first be previously acknowledged by her on a private examination before certain officers.—Clay's Dig. 155 § 27. The words of this act are general, and apply to any estate of the wife, and consequently include leases by deed.—Jackson v. Holloway, 7 Johns. 81, 87. If no estate could pass by her deed not duly acknowledged according to the mode prescribed by the statute, it is absolutely void as to her, (Barnett v. Shackelford, 6 J. J. Marsh. 532; Elliott v. Peirsal, 1 Pet. 328;) and if void, it is incapable of confirmation, except by acts amounting to a re-delivery.—Co. Litt. 215 a; Doe v. Butcher, Doug. 50; Jenkins v. Church, Cowp. 482; Miller v. Shackelford, 3 Dana 289.

In relation to the interest of Mrs. Ross and Mrs. Bryant in the personal property, the question as to whether the assignee for a valuable consideration is not entitled to the wife's choses in action, as against her surviving, unless he has reduced them into possession during coverture, has been much discussed, and the decisions are somewhat conflicting. The inference to be drawn from the earlier cases, as well as the most respectable text writers, is, that the assignment by the husband of the wife's interest in the chose in action for a valuable consideration, will be good as against her surviving, except in those cases where the interest of the wife is of such a nature that it cannot possibly fall into possession during coverture.—Bates v. Dandy, 2 Atk. 207, reported more fully in note to Purdew v. Jackson, 1 Russ. 33; Earl of Salisbury v. Newton, 1 Eden 379; Co. Litt. 351 a, note 304; Roper on Husband and Wife 237; Clancy on Married Women 121. The first decision establishing the contrary doctrine was by Sir Thomas Plummer, M. R., in Hornsby v. Lee, 2 Mad. 15, and was afterwards affirmed by the same judge, in an opinion of great power and perspicuity, in Purdew v. Jackson, after the case had been twice argued; and his decision was confirmed by Lord Lyndhurst, in Horner v. Morton, upon a full consideration of all the English authorities bearing upon the question. The opinion in Purdew v. Jackson is rested mainly upon the acknowledged principle of law, that marriage is not an absolute but a qualified gift to the husband

of the wife's choses in action, and that his right to them only becomes complete by a reduction into possession during its continuance; that a chose in action ceases to be a chose in action only when reduced into possession; and that the assignment does not operate to change its character, or to reduce it into possession, and if it remains in action it belongs to the wife if she survives. If the assignor had no other interest than a right to reduce the thing into possession, that same right must be what the assignor agreed to sell, and the assignee to buy.—The reasons on which the opinion is based appear to us incontrovertible, and although the new doctrine has been ably, but as we think unsuccessfully, opposed by Gibson, C. J., in 4 Rawle 483, the decisions have been acquiesced in in England, and have been received as the law in Virginia and South Carolina, (Browning v. Headly, 2 Rob. 340; Matheny v. Guess, 2 Hill's Ch. 63;) and we think they declare the law correctly.

It is urged, however, on the part of the defendants in error, that by entering into the agreement the executors assented to the legacies, and that as in that event they were *immediately* recoverable, they passed by the assignment of the husbands of the legatees. It is conceded that no direct act to manifest the assent of an executor to a legacy, is necessary. It may be implied from any act or expression on the part of the executor, which clearly recognizes a present right of the legatee to receive the legacy; but, as the consequences of an assent may be highly prejudicial to the representative, it is necessary that there should be no ambiguity in the act or expression by which his assent is manifested.—1 Rop. Leg. 3 Ed. 736. But so far from the agreement indicating any intention by the executors to recognize the right of the legatees to receive the legacies at that time, it appears their whole object was to avoid the abatement of the legacies by transferring the whole of the estate to Goldsby for a term of years, in the hope that they might be ultimately realized by pursuing that course. In no aspect in which it can be presented, can the agreement be fairly considered as denoting the intention of the executors to assent to the legacy.

As to the personal property, therefore, our conclusion is, that the assignment by Ross and Bryant did not, under the circumstances, operate to convey the interests which their wives possessed in the estate of their father, so as to divest them of their

right of survivorship; that the deed of Mrs. Ross and Mrs. Bryant, being made under coverture, was absolutely void, and being void, could not be ratified or confirmed after the disability of coverture was removed, by any act not amounting to a redelivery.

It follows that, as the plea does not show that it was thus confirmed, it was defective, and the demurrer should have been sustained.

The plea is also, as we think, defective for another reason.—The statutes of this State fix and prescribe the duties of the executor, and the powers of the probate court. These duties the executor takes an oath faithfully to execute, and gives bond to secure their performance. The powers of the court are limited, and it must find a warrant in the statutes for all its actions, or it acts without authority. The agreement which is set up in the present case, is outside of the executorship. Can the parties, by their contract, change the whole course of the adminstration? Can they keep the estate in the process of administration for fifteen years, not under the will, but under an agreement entered into by the executors and the legatees with a third party? There is no power in the probate court to administer a trust created by deed in reference to the assets of an estate, after that court takes administration under the law. It can then do no more than comply with the law, in duly administering upon the estate. If the trust is valid, and can be supported, the courts of chancery are the only tribunals that can give relief.

The view we have taken in relation to the plea, renders it unnecessary to determine any other question presented in argument. The judgment is reversed, and the cause remanded.

NEWTON *vs.* JACKSON.

1. When the consideration of a note is not expressed in the instrument itself, parol proof is admissible to show what it was, and that the contract of which the note formed a part had been rescinded by the parties.
2. A general objection to an answer containing competent as well as incompetent evidence, may be overruled.
3. When evidence is adduced to contradict the statement of a witness on an immaterial point, the party who called him may introduce witnesses to sustain his general character, although the opposite party disclaims any intention of discrediting him.
4. A motion to exclude testimony should be clear and specific; if it is so general and indefinite that the mind is at a loss readily to understand the ground which it is intended to cover, the motion should be overruled.
5. A charge which assumes a question of fact to be a question of law, is erroneous.

ERROR to the Circuit Court of Montgomery.

Tried before the Hon. GEORGE GOLDTHWAITE.

ASSUMPSIT by John H. Newton against Henry M. Jackson, on a note for $347 25, dated December 6, 1843, and payable on the 1st January, 1845, with interest from January 1, 1844.

The defendant pleaded, among other things, that the note was given under an agreement in writing in these words:

"This is to certify, that I have this day agreed with Doctor Henry M. Jackson, and hereby bind myself to do and perform the agreement hereinafter expressed, to-wit: whereas I own a certain negro woman, named Eliza, and her child, a boy named William, which negroes are now hired to said Jackson, and the said Henry M. proposes purchasing them from me, I do bind myself to let said Henry M. Jackson have said negroes above named, at the price paid by me at sheriff's sale, viz., $500 25, at any time previous to January 1, 1845, on his paying me the said sum of $500 25, and the further sum of $347 25, in a note of said Henry M. now held by me, and two other notes of said Henry M. Jackson, payable to me for hire of said negroes, one for $53, and due at ten months after date, and dated February 11, 1843, and the other due January 1, 1845, for the sum of $50. Now, whenever said Henry M. shall pay the above named

notes, at any time previous to January 1, 1845, I bind myself to sell said negroes to him on the terms above named, and I further bind myself not to sell or dispose of them to any other person during that period. December 6, 1843."

(Signed) JOHN H. NEWTON.

The plea further alleges, that the note sued on is one of the notes described in this agreement, and was given in consideration of said agreement and the purchase of said slaves; that afterwards, to-wit: on November 30, 1844, said contract was rescinded by the parties, so far as regarded the purchase of the slaves, and the slaves were delivered up to the plaintiff, and were by him accepted in satisfaction of said note.

The deposition of one James Jackson, the father of the defendant, was taken on behalf of the defendant, and was read at the trial. The plaintiff moved to exclude the entire deposition, but the motion was overruled.

The witness testified, in substance, that he knew the consideration of the note sued on from conversations with the plaintiff and his son; that it was given for debts previously due and owing from witness to plaintiff, from which he had been discharged in 1843 under the bankrupt law; that witness was urged by plaintiff, in the summer of 1849 or the spring of 1850, to become a co-signer of said note, on the ground that it was given for his debts, but he refused; that he paid plaintiff, for his son, after their maturity, the two $50 notes mentioned in the contract as having been given for hire, and that he delivered up the negroes to plaintiff, when informed that the contract for their purchase had been rescinded.

The fifth direct interrogatory called on the witness to state anything else he might know, which would benefit the defendant. The answer to it is in these words: "In addition to answers to a former series of interrogatories, I would state that *the consideration for the said note was well known to me.* The July before (1843) a certificate of bankruptcy had been decreed to me in the United States Bankrupt Court for Georgia, *and defendant agreed to give said notes, under conditions prescribed in the contract between plaintiff and himself*, to cover debts to plaintiff enumerated in my bankrupt schedule, drawn up and returned to court in the previous January. The conditions on his side were, the assumption of said bankrupt debts to John H.

Newton; and on plaintiff's side, the relinquishment to defendant of a colored woman and child, named Eliza and William, on defendant's paying the said note and the sum of nearly $500, the price at which the said servants were bought in at sheriff's sale by said plaintiff; and until the said servants were paid for at the stipulated amounts, the said Eliza was to be given up to defendant at the annual hire of $50. The defendant gave two notes for the hire for 1843 and 1844, *both which notes, at his request, and for him, I paid at maturity;* and after the annulling of said contract—an act done, as I understood from defendant, at plaintiff's own proposing—I returned the said servants to said John H. Newton. I always understood, being informed of it at the time or shortly after, that the note and agreement or contract, on which the said note was based, were to be destroyed; and I remained under the conviction that this had been done, until informed of the intention of the suit. I have no belief, and no reason whatever to believe, that plaintiff had any claim on defendant other than what arose from this conditional assumption of my bankrupt debts; for defendant resided in Carnesville, thirty eight or forty miles from Athens, and all pecuniary affairs of his in Athens passed through my hands, and were attended to by me."

The plaintiff objected to those parts of this answer which are italicized; but his objection was overruled, and he excepted.

The fifth cross interrogatory is as follows: "Did you ever hear Henry M. Jackson say anything about making the note on which this action is founded, just before it was made, or just afterwards? If you heard him say anything at the time specified, state what he said, and what you said in reply. Did you caution or advise him in the matter?"

The answer to it is as follows: "On the morning referred to in the answer to second direct interrogatories, as the defendant and myself were walking up into the town, but before we reached plaintiff's store, the defendant stated to me, for the first time, the proposed agreement with plaintiff, then nearly completed; that he, defendant, was to assume the claims on me barred by the statute of bankruptcy, and in return plaintiff was to sell him Eliza and her child, then about two years old, at the price they were bought in at sheriff's sale, say $500, and the amount of note then to be given by defendant, on assuming the debts

thus barred; and that, until defendant was able to do this, hire was to be paid to plaintiff, and the servants to remain in defendant's possession. This conversation was held prior to said note being made. I remonstrated with him on it, and advised not to do it, as he might thus involve himself in pecuniary difficulties, the pressure of which he as yet knew not. He replied, that he should not be involved, and that he wished the servants for his mother's accommodation, as Eliza had been a favorite servant. I did also, at the close of the conversation, caution the defendant, and exhort him earnestly, to be on his guard in all his proceedings with said plaintiff, as a transaction, occurring in January, 1843, had fully taught me that in pecuniary matters he, plaintiff, was not to be confided in, and I knew that defendant was unguarded and unsuspicious."

The plaintiff objected to the whole of this answer; but his objection was overruled, and he excepted.

The third rebutting interrogatory is as follows: "In answer to the fifth cross interrogatory, state all that defendant said as to that note, particularly what he said as to the consideration for which it was given, or was to be given, if you say that he did converse with you about it; and as to the whole contract, if there was any, which gave rise to the giving of the note."

The answer is as follows: "The defendant, both in first conversation with me on our way to store of plaintiff, before the note was made, stated the conditions on which it was, if ever made, to be made, and in subsequent conversations those on which it had been made. Whether the proposition originated with plaintiff or defendant, I do not recollect; but to my caution he replied, that there was no risk of involvement run by him, as the written contract would show why the note was given, if made, and the conditions stipulated to be done by plaintiff. These conditions were, that, for and in consideration of the defendant assuming and giving his note for the amount of claims (and interest thereon,) of plaintiff against me, but barred by the statute of bankruptcy, a certificate under which statute had been decreed to me in the July of 1843, the plaintiff bound himself to sell unto the defendant the servants Eliza and her child, for the same price at which he had purchased them at the sale by the sheriff in the early part of the year; that, until defendant could do this, he was to have the servants in

possession, by paying hire for them annually, at the rate of $50 *per annum*."

The plaintiff objected to the whole of this answer; but his objection was overruled, and he excepted.

The fourth rebutting interrogatory is as follows: "If, in answer to third rebutting interrogatory, you speak of a contract betwee plaintiff and defendant, as told to you by defendant in the conversation asked for in the fifth cross interrogatory, then state all you know of the fulfillment, completion and execution, or of the abandonment and rescission of that contract, as the case may be. In answering this question, state nothing but what you know, and what you derived from the plaintiff's conversation as asked about in the fifth cross interrogatory."

The answer to it is as follows: "A contract was made between the parties, the conditions of which were spoken about in the conversation between plaintiff and defendant in the store of the former, when I was partly present. They were the same that constituted the basis of the contract subsequently made. In fulfillment of that contract the defendant gave the said note, and the plaintiff hired the servant Eliza to defendant, at the stipulated price of $50 a year, a note of which, as well as one for the year 1843 at the same price, was given; both which notes I paid at his request, at maturity. The defendant was then a physician, practicing in Carnesville, Georgia, and his practice warranted the expectation of ability to discharge the note and purchase money, as stipulated in the contract. The year proved a healthy one, and payment he could not make at the close of the year. On stating this to plaintiff, I understood and was informed by defendant, that plaintiff proposed the rescinding of the whole, which, on my advice, was accepted by defendant, and the writing and consequently note were all to be destroyed, and the whole to be abandoned as if never agreed on. I left Georgia a few days afterwards, on a trip to Alabama, directing Eliza and her child to be returned to plaintiff, which was done about Christmas, 1844. On meeting defendant in January or February, 1845, after my return to Georgia, he informed me of the abandonment of the whole, and of the destruction of the papers, as he then supposed. I am under the impression, but not certain, that defendant told me of his throw-

ng his copy of the contract into the fire in the presence of plaintiff."

The plaintiff objected to the whole of this answer; but his objection was overruled, and he excepted.

In one of his answers the witness stated, that, in the spring of 1850 or summer previously, he saw the note now in suit in plaintiff's possession. In answer to this, the plaintiff introduced his attorney as a witness, who testified that said note was in his possession at the time referred to. Thereupon defendant called several witnesses to sustain the character of his said witness for truth and veracity; to which evidence the plaintiff objected, stating that he did not attempt to impeach the character of said witness, Jackson, for truth and veracity, but did not withdraw, nor offer to withdraw, his evidence. The objection was overruled, and plaintiff excepted.

The defendant then introduced the written contract referred to by the witness Jackson, the plaintiff having produced the same on notice to him, and it was read to the jury; "and the plaintiff then moved the court to reject the testimony of the witness Jackson in the note and agreement; which motion being overruled by the court, the *defendant* excepted."

The plaintiff moved to exclude the deposition of said Jackson, on the ground that he had heard only a part of the conversation of the parties, and because the stipulations were afterwards reduced to writing; but the court overruled the motion, and plaintiff excepted.

"The plaintiff asked the court to charge the jury, that the note was independent of the agreement, and that the agreement was not the consideration for the note;" which charge the court refused, and the plaintiff excepted.

All the rulings of the court above set forth, to which exception was taken, are now assigned for error.

W. B. Moss, for plaintiff in error:

1. When it appears that the stipulations sought to be proved were reduced to writing by the parties, the writing is the best, and *prima facie* the only evidence admissible.—1 Green. Ev. § 87; 10 Ala. 163, 554; 1 M. & M. 258; Paysant v. Ware *et al.*, 1 Ala. 162.

2. The court may look to any part of a deposition, to deter-

mine the competency of another part or of the whole.—Hatchett v. Gibson, 13 Ala. 597.

3. Bankruptcy cannot be proved by parol.—3 Camp. 236.

4. To make a party's declarations admissible on the ground that they were called for by the adverse party, they must be responsive to the interrogatory; and this rule will not be held to substitute secondary evidence, as hearsay, and parol testimony of the contents of a record or written instrument.—9 C. & P. 313; 1 *ib.* 558; 3 B. & Ald. 588; 3 Camp. 236; 2 Bos. & Pul. 548; 1 Green. Ev. § 203.

5. Evidence to support the character of a witnes is inadmissible, unless his character has been impeached: mere contradiction among witnesses will not authorize it. Bishop of Durham v. Beaumont, 1 Camp. 207, which has been followed by all the writers on evidence, and sanctioned by all the authorities.—1 Green. 469; 2 Russ. on Crimes 940; 1 Stark. Ev. 186; 9 Watts 124; 5 Cowen 314; 8 Pick. 154; 19 Wend. 579.

6. After the writing had been adduced, the depositions of the witness about the contemporaneous and previous stipulations of the parties were clearly inadmissible, and should have been excluded.—Cuthbert & Stanley v. Bowie, 10 Ala. 163, is conclusive on this point. See also West & West v. Kelly's Exrs., 19 Ala. 353; Hair *et al.* v. La Brouse, 10 Ala. 554; Paysant v. Ware & Barringer, 1 Ala. 164; McNair v. Cooper, 4 Ala. 660.

7. It is the province of the court, and its duty, to expound all written instruments of evidence, and to state their legal effect.—Earbee v. Craig, 1 Ala. 607; Bank v. Boykin, 9 *ib.* 322.

8. The agreement was an undertaking on the part of plaintiff, in consideration that the defendant would pay the note before it fell due, ("previous to January 1, 1845,") to sell him certain negroes at a certain price. It speaks of the note as "one now held by" plaintiff. The parol evidence offered went to vary and contradict the written agreement, which the court should have excluded, and charged the jury upon the legal effect of the agreement as requested.—See cases above cited.

Elmore & Yancey, *contra:*

1. The motion to exclude the whole of Jackson's deposition,

for the reasons set forth in the motion, was properly overruled, there being legal testimony in it.—Smith v. Zaner, 4 Ala. 99; Hrabrouski v. Herbert, 4 Ala. 265; Melton v. Troutman, 15 Ala. 535.

2. The motion to exclude the words excepted to in the answer to the fifth direct interrogatory, was properly overruled, because: 1st. The consideration of the note sued on was relevant under the pleadings. 2nd. Such consideration can be proved by parol testimony.—Cuthbert & Stanley v. Bowie, 10 Ala. 163. 3rd. A part of the words excepted to only tended to prove the consideration of said note. 4th. The other words excepted to only tend to prove compliance with the contract by defendant, which had not been annulled. 5th. Even if the last clause of the words excepted to was irrelevant, still the motion to exclude was properly overruled, for, the other parts being legal, the court was not bound to separate the good from the bad.—Smith v. Zaner, 4 Ala. 99.

3. The motion to exclude the entire answer to the fifth cross interrogatory was properly overruled, because the answer was responsive to plaintiff's own interrogatory, because it proves the consideration of the note sued on, and because a general objection to an answer of which a part is relevant should be overruled.—Borland v. Walker, 7 Ala. 269; Donnell v. Jones, 13 Ala. 490; Milton v. Rowland, 11 Ala. 732.

4. The motion to exclude the entire answer to the third rebutting interrogatory, was properly overruled, because it was responsive to the question, because it proved the consideration of the note, and because it contained some evidence which was legal.—Cases cited above.

5. The motion to exclude the entire answer to the fourth rebutting interrogatory was properly overruled for the same reason.

6. The testimony of plaintiff's attorney was not merely contradictory testimony as to the subject matter of the suit, as was the case in the Bishop of Durham v. Beaumont, 1 Camp. 207, but it was introduced purely to contradict Jackson; it could not be considered by the jury as substantive testimony, nor as proving the time when the attorney held the note, as a fact to sustain plaintiff's cause. It could only tend to discredit Jackson, and was only relevant to that issue; and this being the case, defendant had the right to sustain his witness.

7. The motion to exclude the testimony of Jackson in reference to the note and agreement, was properly overruled, because it was "too general, vague and indefnite, imposing on the court the burthen which belonged to the objecting counsel."—Donnell v. Jones, 13 Ala. 506.

8. The charge asked was erroneous. The note and the agreement were both executed on the same day, and refer to each other; and the proof showed that the note was the one referred to in the agreement.—Rives v. Toulmin, 19 Ala. 298. The charge took from the jury a matter which it was their province to decide, towit: what was the consideration of the note sued on.

PHELAN, J.—It was entirely competent for the defendant, Jackson, to show the consideration of the note on which he was sued. This he does by the testimony of his father, James Jackson, who, both in the direct and cross examination, states the substance of the agreement between plaintiff and defendant for the purchase of the slaves, Eliza and her child William, the knowledge of which he derived from declarations of the plaintiff, and declarations of the defendant called for by the plaintiff on cross examination. A part of this agreement he shows was, that, in consideration that plaintiff agreed to sell Eliza and her child, at the price he paid for them at sheriff's sale, to the defendant, he, the defendant, agreed to give his note for $347 25, (the note sued on,) for debts previously due from the father of defendant to the plaintiff, and which had been discharged under the bankrupt law. The written agreement was silent as to the consideration of that note, and therefore it could be proved by parol, without in any manner conflicting with the rule in regard to contradicting written instruments. The testimony of this witness also went to show, that the slaves had been returned to the possession of the plaintiff, a fact conducing to prove that the agreement between plaintiff and defendant, of which the note in suit formed a part, had been rescinded by the parties.

The motion to exclude the entire deposition, upon the ground that it went to contradict or vary the written agreement, was properly refused. The parol testimony, in fact, agreed with the written instrument, as far as that went, and the proof in

relation to the consideration of the note, and the rescission of the agreement, could not be affected by that objection, at all events.

The special exceptions taken to the parts of the answer to the fifth direct interrogatory, particularly designated in the statement of the case, have not been urged by plaintiff in error upon our attention, and from such examination as we have given them, we do not consider them well taken.

The body of the answer to the fifth cross interrogatory, is directly responsive to the question put by plaintiff himself, calling for the declarations of the defendant; and although it contains also matter that is not responsive, and which for that reason is not competent, the objection to the answer was general, and, therefore, properly overruled. The rule upon this subject is familiar.—Borland v. Walker, 7 Ala. 269; Murrah v. Branch Bank at Decatur, 20 Ala. 392.

The objection to the answer to the third rebutting interrogatory, was properly overruled. The answer was responsive, and the proof competent.

The objection to the answer to the fourth rebutting interrogatory, was general, and, therefore, properly overruled, although it contained some hearsay evidence not competent, the body of the answer being competent.

The witness, James Jackson, was asked to look at the note on which this suit was brought, and to say whether he had ever seen it before. He answered that he never saw it but once, and that was in the summer of 1849, or spring of 1850, at which time it was in the possession of the plaintiff. He then gave his testimony in relation to the contract and agreement of the parties respecting this note, as before stated. The plaintiff afterwards called a witness, (his attorney,) who testified, that the note was in his possession at the time when James Jackson swore it was in the possession of the plaintiff. Thereupon the defendant called witnesses to sustain Jackson's general character for truth and veracity. To this plaintiff objected, and said that he did not aim to impeach the credibility of the witness Jackson, but would not consent to withdraw the testimony he had offered in regard to the possession of the note. Upon his refusal to withdraw the testimony, the court permitted the de-

fendant to call witnesses to sustain the general character of the witness, James Jackson, and plaintiff excepted.

If the testimony adduced by plaintiff to contradict what Jackson had said about the possession of the note, was not intended to impeach his credibility, it was wholly irrelevant.—Where the note was, in whose possession in 1849 or 1850, was, of itself, wholly immaterial to the issue. The question in relation to its possession only became material as a means of testing either the accuracy of the recollection of Jackson, or his truthfulness; for, when asked if he had seen it before, he answered that he had, and gave time and place. The act then of the plaintiff in calling a witness to contradict Jackson in this matter, could have no other legitimate object than to impeach his testimony. This object the plaintiff disclaimed, but refused to withdraw his testimony, The right of the defendant to call witnesses to sustain the general character of Jackson, under these circumstances, was clear.

The motion of the plaintiff, "to reject all the testimony of the witness Jackson in reference to the note and agreement," was too general and indefinite to be noticed. It is the business of the parties and their counsel to make their points clear and specific. The responsibility and labor of those who have to decide is great enough, when the propositions laid before them connected with the case are precise and plain. Hence, when the mind is at a loss readily to understand the ground which an objection or motion is intended to cover, a court may and ought to refuse to grant it for that reason.—Donnell v. Jones, 13 Ala. 506.

The charge asked by the plaintiff was properly refused.—Whether "the note was independent of the agreement," or whether the agreement was or was not the "consideration of the note," were both *questions of fact*, which it was the right and duty of the jury to settle according to the proof. The charge as asked made the court assume the right of deciding these questions of fact, and was, therefore, properly refused.

From what has been said it will appear, that we find no error in the record, and the judgment below is affirmed.

TARLETON *vs.* GOLDTHWAITE'S HEIRS & ADM'R.

1. In chancery cases, when the decree is voluntarily executed by the parties, and the complainant receives the money decreed to him, he may nevertheless prosecute an appeal.
2. Memoranda from books, and written documents, when produced in response to a call in the bill, are evidence in the cause, but not necessarily conclusive evidence of the facts which they tend to establish.
3. Where the bill alleges an indebtedness on the part of the defendant's intestate to complainant, for rents received and not paid over or accounted for, and charges that defendant has in his possession the documents showing such indebtedness, and calls for their production; and the documents, when produced, tend to show that no indebtedness whatever existed, the complainant may nevertheless establish his claim by other evidence.
4. Where one tenant in common, having obtained a conveyance from his co-tenant for the purpose of mortgaging the entire estate, and bound himself to reconvey one half of the land after the mortgage is raised, rents out the premises, and collects the rents, he becomes, as to these rents and profits, a trustee by implication for his co-tenant, and when the latter seeks an account of them, the statute of limitations of six years will bar him.
5. When the complainant seeks an account of rents received by the defendant, his co-tenant, and not paid over or accounted for, and proves the contracts of rent made by him, fixing the amounts &c., this is sufficient, *prima facie*, to charge the defendant with the entire amount, and to throw on him the *onus* of showing what he did not receive.
6. Where the defendant receives rents under an implied trust for his co-tenant, he is chargeable with interest on the amount found in his hands from the time of its receipt.

APPEAL from the Chancery Court of Mobile.
Heard before the Hon. J. W. LESESNE.

This bill was filed by the appellant against the appellees, seeking a re-conveyance of one half of a certain lot in the city of Mobile to the complainant, and for an account of the rents of the same for a series of some nine or ten years. The bill is filed against the administrator and heirs of Henry Goldthwaite, deceased, alleging that previous to the 29th day of April, 1837, the complainant and Henry Goldthwaite were tenants in common of a certain lot of land, particularly described, in the city of Mobile, and on the said 29th day of April, at the instance and request of the said Goldthwaite, who was desirous of effecting

a loan from the Life and Trust Company of Mobile, and wished to have the entire legal title in himself, for the purpose of mortgaging the same in order to effect the loan aforesaid, the said complainant, at the instance and request of the said Goldthwaite as aforesaid, conveyed to the said Golthwaite his undivided half of the said premises, and at the same time took from the said Goldthwaite the following instrument :

"George W. Tarleton has this day conveyed to me, by quitclaim deed, all his title to the house and lot on the west side of Royal street between Dauphin and St. Francis streets, 24 feet front by 117 feet deep, between houses of J. Perine, which lot I am about to mortgage to the Life Insurance and Trust Company : Now be it known that I am bound to raise all encumbrances which shall be created by me on said house and lot, and to re-convey one undivided half of the same to the said George W. Tarleton, whenever the mortgages created by me are raised. Mobile, 29th April, 1837.

(Signed) HENRY GOLDTHWAITE."

The bill charges that, after the said conveyance to the said Goldthwaite, he took the entire management and control of the premises, and rented them out, and collected the rents thereof, as if they were his ; that for the year 1838 he accounted to complainant for the half of said rents, but since that time no account has been rendered, and no rent paid complainant, up to the death of the said Goldthwaite ; that complainant never called upon the said Goldthwaite to account in his life time, partly because of the great confidence he had in the said Goldthwaite, that he would account fairly, and partly because during most of the period above named the said Goldthwaite was under liabilities for the said complainant and the late mercantile firm of Tarleton & Bullard ; that a short time before the death of the said Henry Goldthwaite, complainant called upon him for a settlement and account, with which requests the said Goldthwaite promised to comply, but was prevented from doing so by his death, which occurred in the autumn of 1847.

The bill also charges that said Goldthwaite, in his lifetime, kept an account of the receipts of said rents, and of the facts appertaining thereto, and that his administrator, John A. Campbell, has the evidences in his possession ; that the said Campbell admits the interest claimed in the land by the complainant, but does

not admit an indebtedness for rents received and not accounted for by his intestate; and the bill is therefore filed to establish the complainant's claim to an equal portion of the rents since 1838, as well as for a re-conveyance to complainant of the one half of the said premises. The bill prays that such a conveyance be decreed to be made; that such an account be taken of the rents received since November, 1838, the one half of which be decreed to complainant; and to this end the bill prays that "the said John A. Campbell, as administrator as aforesaid, may answer and discover and produce any and all papers and memoranda in his possession, found among the papers of the said Henry Goldthwaite, deceased, respecting the right or claim of complainant to one undivided half of the said house and lot, or of the rents and profits of the same, or showing the amount of rents and profits of the same received by the said Henry Goldthwaite from the first of November, 1838, up to the time of his death" &c.

The answer of John A. Campbell, the administrator, admits the liability of the heirs to make conveyance of the premises demanded, but denies any indebtedness on the part of his intestate for rents received and unaccounted for; and pleads the statute of limitations of six years, and also that of three years. Defendant states that he has a schedule of the property of the intestate, made in his own hand-writing, in which appears as belonging to his said intestate the entire rent of said property up to the 1st of November, 1847; and in the same schedule the said intestate makes a statement of his debts, and no entry of any debt to the complainant appears in such schedule.

The defendant, in response to that portion of the complainant's bill calling for papers and memoranda from the books &c. of the said intestate, propounds three papers, two of which appear to be mutual receipts in full, prepared apparently with a view to a full and final settlement between the parties, and the other is in the following words:

"The undersigned, after the 1st of November, is to hold the house and premises No. 28 Royal street as the joint property of himself and Tarleton & Bullard, one half to each, and the rents accruing after that period are to be jointly divided. Mobile, May 7, 1847."

The receipts above mentioned bear the same date as the pa-

pers just above set forth. The answer states that there appears no evidence on the books of the intestate that the complainant had any interest in the rents of the premises since 1839, and no account of the expenses of the property, and this circumstance is relied upon as persuasive to show that the complainant had no interest in said rents; that said intestate was in easy circumstances, and prompt in his dealings and business habits; and the complainant, during the greater portion of the time for which the rents are demanded, was in embarrassed circumstances, and professing himself to be insolvent; that the said complainant is a careful, cautious man in his habits; and all these facts are also relied upon as pursuasive to show that no indebtedness exists from the intestate to the complainant for the rents aforesaid.

The answer further states that the amount of money received for the rent of the said premises was as follows: For 1840, tenant M. J. McRea, $300 00; 1841, tenant Sally Bryant, $600 00; 1842, tenant Willy Harbin, $573 78; 1842, tenant Black Barbee, $56 50; 1843, tenant, Walker, $625 00; and that for the rent of 1844, 1845 and 1846, he holds the notes of S. W. Allen, Christopher Heart and wife, and Jane Ledyard; and for the year 1848 Mrs. Pattison's at the rent of $550 00; also, that among the papers of the said Goldthwaite there are the following papers, apparently for the rent of the said premises: Four notes of N. & J. Tisdale for $207 20; ten notes of one Whorrall for $25 each; four notes of Moses Pearson for $25 each; and seven notes of a man whose name is illegible, but for how much the answer does not state.

The answer of the heirs by their guardian *ad litem* is nearly to the same effect as the answer of the administrator.

The proof upon the hearing was, that the said Goldthwaite was relieved from all liability for the said Tarleton or Tarleton & Bullard as early as the year 1842. There was other testimony on the hearing, but this is all that is deemed necessary to be stated in this connection, in order to an understanding of the facts of the case.

The cause was submitted for final decree, on bill, answers, exhibits and proof; and the Chancellor rendered his decree ordering a re-conveyance of one half of the premises in question to the said Tarleton, and that he was entitled to an account for the rents and profits of the same for six years next preceding

the filing of the bill, not counting six months of the administration of the said J. A. Campbell and the period between the intestate's death and grant of letters of administration to the defendant as part of that period.

The court directed the master to take an account, to ascertain the amount of the rents received, and whether any and what were lost by the negligence or wilful default of said Goldthwaite, and what amount; also, what papers remained on hand as evidence of debt for rent. The master was also instructed to make allowances for repairs, and valuable and permanent improvements, and necessary and proper expenses.

Further testimony was taken before the master, the result of which appears in his report, and may be thus stated. The rent contracts from 1842 to 1847 inclusive, amounted to $4950 00. Of this amount there was collected in money the sum of $2248 78, and of this sum there was expended for repairs, insurance, taxes &c. on the property, the sum of $1062 80. The master also reported on hand, in the shape of notes given for rent of said premises, in the hands of said administrator and uncollected, the amount of $1300.

Exceptions were filed to this report, all of which were overruled by the master, and his decision sustained by the Chancellor, except as to one matter, viz., as to the allowance made the defendant for repairs, in the absence of proof showing the actual disbursements by the said intestate in his life-time. This exception prevailed, and the matter was referred back to the master to report how much the said intestate actually disbursed for expenses, repairs, &c. The master made another report, by which he ascertains that the amount of expenses for repairs, for the period aforesaid, was $164 20, instead of $395, as reported by the first account, and makes a difference in the final result of the account of $105 40 in favor of the complainant.

The exceptions taken to the report of the master and which were overruled by the master and Chancellor, were:

1. That no interest was allowed on the amount of money collected by the said intestate from the time when the money was collected by him.

2. That it appears from the report that the premises were rented out by said intestate during the years inquired of for the sum of $4950; that he had collected the sum of $2248 78,

and had rent notes and other evidences of rent on hand only amounting to the sum of $1300, leaving a balance of $1351 22 wholly unaccounted for; and the master did not charge the administrator with any part of that balance.

The Chancellor rendered a final decree ordering the deed to be made as aforesaid, and ordering the defendants to pay to the complainant the sum of $937 27, being the amount ascertained by the master in his said report.

From this decree the complainant has appealed, and here assigns for error:

1. In limiting the complainant's recovery, in the order of reference in the first decree rendered, to six years next preceeding the filing of the complainant's bill.

2. In not allowing interest on the money collected by the intestate from the time it was so collected.

3. In not charging the defendant for that portion of the rents proved to have been earned, and not accounted for by the intestate or the defendants.

A motion is made on the part of the appellees to dismiss the appeal, because the decree has been complied with by them before the appeal taken, and because the appellant had received both the deed and money decreed to him by the court below, and it is here insisted that he has thereby waived his appeal.

Hopkins & Jones, for appellant:

1. This is a clear case of a direct, express trust, created by contract and act of the parties, peculiarly cognizable in equity. It was a continuing, recognized trust. Goldthwaite was trustee, and Tarleton *cestui que trust*. The authorities are numerous, full, and direct, to the point that, in such trusts, the statute of limitations does not apply, as between the trustee and his *cestui que trust*.—Hill on Trustees 263, 264; Lewin on Trusts (24 Law Library) 611; Wedderburn v. Wedderburn, 4 Mylne & C. (18 En. Ch. R.) 41, 52; Coster v. Murray, 5 Johns. Ch. R. 522, 531; Pinkston v. Brewster, Solomon & Co., 14 Ala. 315, 321; Wisner v. Barnett, 4 Wash. C. C. R. 632.

2. The trustee was bound to account for the rents. It was proved that he rented out the property, and the amount for which he rented it each year was shown. This was certainly sufficient to charge him, and to throw upon him the burden of

proving that it had not been collected, and could not be. Yet the master and the court below refused to charge him with a large amount which was wholly unaccounted for, and charged him only with what he admitted to have been collected. This was palpably illegal and unjust.

3. The court below also refused to charge the defendant with interest, even on the rents admitted to have been collected, and retained for years and years without being paid over. Trustees and others acting in a fiduciary character, are chargeable with interest on moneys collected and not paid over in a reasonable time. Interest should have been allowed in this case.—6 Har. & J. 529; 10 Gill & J. 175; 2 Call 249; 3 *ib.* 538; 1 Johns. Ch. R. 82; 4 Dess. Eq. R. 110; 1 Ashmead 105; 3 Grattan 518, cited in 7 U. S. Digest 315 § 23; 4 Grattan 57.

4. As to the motion to dismiss the appeal because defendant has voluntarily paid, and the plaintiff received, what was confessedly due at all events: It cannot be maintained on any principle of law or justice, nor on any authority. Even the cases of Hall v. Hrabrouski, 9 Ala. 278, and Bradford v. Bush, 10 *ib.* 276, do not go this length: they allowed the plaintiff the privilege of refunding, and gave him time to elect. But these cases have been held by this court not to apply to chancery cases.—McCreeliss' Disributees v. Hinkle, adm'r, 17 Ala. 459; Knox v. Steele, 18 *ib.* 815. There is a good reason for the distinction between a common law judgment and a decree in chancery. The judgment is an entire thing; the decree consists of parts, and may be partly right and partly wrong.

Campbell & Chandler, *contra:*

The appellees move to dismiss the appeal, because the decree has been executed so far as the appellant is concerned, and he has acknowledged satisfaction upon its face. An appeal is a civil law remedy; the effect of it is, to transfer the case from one court to another, in the same condition in which it was in the inferior court.—5 Cranch 281; 7 *ib.* 110; 2 Kelly's R. 338; 1 Bouv. Law Dic. 113. Under the civil law, an appeal could not be taken from an executed judgment, when it was done by the voluntary act of the party.—6 Martin 723; 4 Rob. 85; *ib.* 163; 6 *ib.* 136. The same principle has been adopted in the Ecclesiastical Courts of England.—3 Haggard's Ec. R.

481. The Supreme Court of this State has decided, that, where money has been coerced by execution, it must be restored before a writ of error is allowed.—Hall v. Hrabrouski, 9 Ala. 278; Bradford v. Bush, 10 Ala. 276. The plaintiff here has received the money decreed to him, and the deed to one half of the land, making no reservation or protest. He has received the benefit and fruits of the decree, and the court will not now revise it at his instance.

As to the plea of the statute of limitations: The queston is not whether the suit is at law or in equity, nor whether the title is legal or equitable, to sustain a plea of the statute. Where the title is legal, and the court acts concurrently with the courts of law, the statutes of limitation are obligatory on the Court of Chancery, and that court acts "in obedience to the statute." 2 Story's Eq. 735 § 1520. Where the title is equitable, and the complainant is bound to come into chancery, that court adopts the rule of the statute "in analogy to the rule of law." The case of the relation of trustee and *cestui que trust*, where the statute is applicable, has its analogy in cases at law. The statute does not run between bailor and bailee, until there is a disavowal of the bailment. The doctrine laid down in Benje v. Creagh, 21 Ala. 151, is the principle that applies to the case of trustee and *cestui que trust*. The trustee may plead the statute, after he has disclaimed the relation, just as the bailee or the tenant might.—6 Peters 61; 10 *ib.* 223; 7 Johns. Ch. R. 90. Before this time, the trustee is supposed to hold only for the purposes of the trust; his position is harmonious with that of the *cestui que trust*.—7 Johns. C. 122. He will not be allowed to take advantage of the confidence which his fidiciary relation created.

Let us apply these principles to the present case. The conveyance to Goldthwaite was for a single object. For some reasons not now known, and on some considerations which are lost by his death, he takes a conveyance of property held by him as tenant in common with Tarleton, for the *sole* purpose of giving it as a security in mortgage. Here his power terminated under the agreement; he did not undertake to collect and pay over rents under the agreement, nor did he take possession of them by it. The mortgage was made in 1837. It does not appear that he was to receive the rents, nor that it was desirable or nec-

essary: on the contrary, it plainly was not. He could have conveyed to Tarleton the day after the execution of the mortgage, without prejudice or objection from the mortgagee.—Tarleton does not pretend that Goldthwaite collected the rents under this title, nor that he was not authorized to collect them himself; nor is there any proof, or admission, that, for years after the mortgage was made, Tarleton was in receipt of rents. He charges that he allowed Goldthwaite to collect them, under some notion of indemnity upon distinct, independent and *ex post facto* considerations, moving his own mind, but never, so far as he avers or proves, communicated to Goldthwaite. What, then, is the express trust, that subsisted all this time? Tarleton might have filed a bill for an account, at any time. The right to an account arose when the money was received, as in other cases of tenancy in common. The fact that the legal title was in the one or the other, does not militate against the plea. The money was received for Tarleton's use at the very moment Goldthwaite obtained it, so far as the agreement is concerned.—8 Porter 213; Bald. R. 261; 7 Johns. Ch. R. 116; 10 Vesey 483. The rents, then, not being received under the agreement, the duty to account arose on the receipt of the money; and the case bears a direct analogy to the action of account at law. It is not the case of a technical trust, having its existence only in chancery, and of which chancery is the author, but a jurisdiction growing out of the accidental state of the titles, where the rules applied in equity follow those prevailing at law.—20 Johns. 576; 4 Ired. Eq. R. 1; 4 Mason 152; 2 Atk. 610; 9 Pick. 244.

The following cases have been decided upon the points involved in this case. The account in behalf of one tenant in common against his co-tenant, for perception of profits, is within the statute of limitations.—Coleman v. Hutchinson, 3 Bibb 210. In cases of implied trusts in relation to personal property, or to rents and profits of real estate, when persons in their own right are turned into trustees by implication, the right of action in equity will be considered as barred in six years.—4 Cowen 718, 742; 20 Johns. 576. If one joint tenant or tenant in common receive the rents and profits of the estate, claiming them as his own, the statute of limitations in equity will bar his co-tenant.—4 Yerger 104; 7 *ib.* 222.

There was an attempt made in the court below to charge Goldthwaite with rents which he did not collect. The bill only claimed one half of the *actual receipts*. There is no charge of any mismanagement, fraud or neglect. The prayer of the bill is for one half. A mortgagee in possession is only liable for gross neglect; *prima facie*, the mortgagor can only claim the actual receipts.—4 Kent's Com. 173; 5 Pick. 260; 2 J. J. Marsh. 465; 2 Call 362; 3 N. H. 9; 4 Iredell's Eq. 1.

On the subject of interest, see 5 Mason 332; 11 Gill & J. 185; 4 Ired. Eq. 1.

GIBBONS, J.—A motion is made in the present case to dismiss the appeal, on the ground that the decree of the chancellor has been executed by the defendants, and acquiesced in on the part of the complainant. This motion is predicated on the cases of Hall v. Hrabrouski, 9 Ala. 278, and Bradford v. Bush, 10 Ala. 274. These were cases at law, where writs of error had been sued out and prosecuted in this court, and pending the litigation the plaintiff below had collected his judgment by execution. On the judgment being reversed by this court, a motion, founded upon the fact that the judgment below had been coerced by due process of law, was made in this court to dismiss the writ of error, or stay the certificate of reversal until the plaintiff should restore to the defendant what he had thus coerced from him on a judgment then reversed and held for nought at his own instance. The court entertained the motion in both the cases, and denied the party the right to prosecute his judgment, by enforcing its collection, at the same time that he is seeking a reversal of it; and the court intimate, in the latter case, that, if a motion had been made to dismiss the writ of error before the case was tried in the Supreme Court, on the facts disclosed on the motion then on trial, such motion would have prevailed.

The same principle was afterwards invoked in the cases of McCreeliss' Distributees v. Hinkle, adm'r, 17 Ala. 459, and in Knox v. Steele, 18 Ala. 815. These were cases originating in the Orphans' Court; and this court, while it recognizes the correctness of the rule as laid down in the cases in 9 Ala. R. and 10 Ala. R., above referred to, distinguish between those cases and the case presented in 17 Ala. The principle is said to be pe-

culiarly applicable to judgments at law, but is not necessarily applicable to cases arising in the Orphans' or Chancery Courts. The reason of this distinction we apprehend to be, that if a judgment at law is reversed, it abrogates the whole judgment. It cannot be reversed in part, and affirmed in part; whereas, in cases from the probate court, and in chancery cases, the judgments or decrees may be reversed in part, and affirmed in part. On the reversal of a judgment at law, therefore, the theory of the law is that the parties are placed in *statu quo*, and are to be considered as if the judgment had never been rendered. In the case of McCreeliss' Distributees v. Hinkle, adm'r, it is said: "The power thus exercised by the appellate court, to compel the plaintiff to refund the money or dismiss the writ of error, seems to me to be a discretionary one, and may be well exercised when the conduct of a party is vexatious or oppressive, and may ultimately result to the injury of the other; but, when the defendant can in no aspect of the case be injured by the plaintiff's receiving the money, and this is paid without compulsion, I see no good reason why we should make an order on the plaintiff to refund the money, or to submit to a dismissal of his writ." We consider this reasoning applicable to the case before us, and it is, in our opinion, decisive of the question. The defendant's motion to dismiss the appeal, therefore, cannot prevail.

The next question, in the order in which we propose to examine the present record, is, whether in the bill, answers, exhibits and proofs, the complainant is entitled to a decree for any thing whatever for rents collected by the intestate in his life time and unaccounted for. It is insisted that, as the complainant's bill, charging indebtedness and demanding the account, calls upon the defendant Campbell to exhibit the documents, memoranda, papers and written evidences tending to establish the state of the accounts between the complainant and the said intestate, in the hand-writing of the said intestate; and inasmuch as the answers deny such indebtedness, and any liability to account, and these documents produced in response to the call of the complainant become evidence in the cause, and show no liability on the part of the intestate to the complainant, so far as the question of rents is concerned—therefore, the complainant is not entitled to an account. It is undoubtedly true,

that memoranda from books, and written documents, when produced in response to a call from the complainant by way of discovery, become evidence in the cause; but, like most other evidence offered upon the trial of causes, it is only evidence tending to prove a conclusion, bnt is not necessarily conclusive to establish the result which it tends to prove. Taking all the evidence upon the question of the liability of the administrator to account, the case stands thus: In favor of the complainant is the charge in the bill of the liability, with the allegation that the intestate accounted for the rents up to the 1st of November, 1838; and proof that the intestate rented the premises in his own name, and received the rents therefor, all the while recognizing the right of complainant to one half of the land. On the other hand, against the indebtedness, is, first, the answer of the defendant denying the debt, not from personal knowledge, but from belief merely, founded upon the character of the parties and of their situations during the space of time over which the account claims to run; secondly, the fact that there appears upon the books of the intestate the evidence of accounting for the rents up to the 1st of November, 1838, and no evidence afterwards of any accounting, or liability to account, for said rents, on the books or among the papers of said intestate; thirdly, the mutual receipts of the parties, prepared as if in anticipation of a final settlement, or after a settlement had taken place, but not signed by the parties, and the document relative to the rents of the said premises after the 1st of November, A. D. 1847.

In thus stating the evidence, the complainant, in our opinion, has the advantage, and the proof tending to show a liability on the part of the administrator to account, greatly preponderates over that tending to show a contrary conclusion. The complainant does not call upon the defendant to disclose the evidence of a liability to account. This he charges distinctly in his bill, and proposes to prove; but he charges that the defendant, the administrator, has in his possession the specific data by which that account shall be made up, and calls upon him to produce such evidence to the court. The defendant complies, produces the evidence, and when inspected, so far from giving the information which the complainant sought, it tends rather to show no indebtedness at all. But we do not consider this evidence suf-

ficiently weighty to overbalance the proof of the complainant, tending to show a liability to account for rents in the hands of the intestate, and we must decide according to the weight of evidence.

The first error assigned upon the record is, that the court below sustained the plea of the statute of limitations of six years, and limited the complainant's demands to six years next preceding the filing of the bill. The question raised by this assignment is, whether the statute of limitations applies to a trust of the nature and character of the one in question. It is contended on the part of the complainant, that this is an express trust, created by the act of the parties, and to such a trust the statute of limitations can never be pleaded. This principle is well sustained by authority.—Hill on Trustees 263, 264; Lewin on Trustees 611. But while this is true, it is equally true that a trust created by implication is subject to the statute of limitations. Says Mr. Lewin, in the work above cited, "It is a well known rule, that, as between *cestui que trust* and trustee, in the case of a direct trust, no length of time is a bar; for, from the privity existing between them, the possession of the one is the possession of the other, and there is no adverse title. It has hence been argued that, as the person into whose hands the estate is followed, is also, by construction of law, a trustee, the *cestui que trust* is entitled to the benefit of the rule, and is not precluded by mere lapse of time from establishing his claim; but the authorities to the contrary are clear and express, and cannot leave a doubt."

"It is certainly true," said Sir William Grant, "that no time bars a direct trust; but, if it is meant to be asserted that a court of equity allows a man to make out a case of constructive trust at any distance of time after the facts and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be; so far from it, that not only circumstances where the length of time would render it extremely difficult to ascertain the true state of fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who after long acquiescence comes into a court of equity to seek that relief."—

Beckford v. Wade, 17 Vesey 97. To the same effect is the language of Lord Redesdale, in the case of Hovenden v. Lord Annesley, 2 Sch. & Lef. 633.

The question, then, arises, whether the claim set up by the complainant for the rents is founded upon an express or an implied trust. As to the land itself, the trust is undoubtedly direct, and was created by the act of the parties; but as to the rents and profits of the land, there is nothing whatever said in the paper which was given by Goldthwaite to the complainant, on receiving from him a deed for the one half of the premises. As to these rents, the intestate acquired the character of trustee purely by implication, and as an incident to the express and direct trust created by the parties. Our conclusion, then, is, that the claim set up for rent by the complainant, under the circumstances, is one to which the statute of limitations does apply.—On this subject Mr. Lewin remarks: "Wherever there is a statutable bar at law, the same period is by analogy, or rather in obedience to the statute, adopted as a bar in equity."—Lewin on Trustees 613. There was, therefore, no error in the decree of the Chancellor, in limiting the demand of the complainant to six years prior to the filing of the bill, deducting the time elapsing between the death of the intestate and the six months after the grant of letters of administration to the defendant on the estate of the intestate.

The next assignment of error is, that the court refused to charge the defendant with the amount of rents not accounted for. The proof on this subject before the master was, that the contracts for rent during the period inquired of produced $4950. Of this sum, the defendant acknowledged to have received the sum of $2248. The defendant showed the further sum of $1200 in his hands, in the shape of notes arising from the rent of the said premises. But there yet remained the sum of $1351 22, entirely unaccounted for. We apprehend it would not do to say that this portion of the rent contracts was not received by the intestate, because no evidence of it appears upon his books. After the rent contracts are proved, fixing the amount at which the property was rented from year to year, we apprehend the burden of proof is then changed to the defendant to show what was or was not received, if he would avoid a liability to account according to the contracts. In refusing to

charge the defendant with the half of this amount of rent entirely unaacounted for, the court below, in our opinion, erred.—It is insisted that, as the bill only calls for an account of what rents were received, this item does not fall within the purview of the bill, until the proof shows they were in fact received.—In our view, the proof does show, *prima facie*, that the portion of the rents represented by this item was received, and that proof consists in showing the contracts for renting as above set forth. That proof is sufficient, *prima facie*, to charge the defendant with the amount, and it rests with him, after it is made, to show that it was not received, or what part, and for what reason it was not received.

The court, in our opinion, also erred in not charging the defendant in the account with interest on the money actually received by the intestate from the date of such receipt. In the case of Whitworth and Wife v. Hart *et al.*, 22 Ala. 343, at the last term of this court, we decided that "interest was but a just compensation for the withholding of the principal, and when the principal is ascertained to be due at a particular period, and remains unpaid without a sufficient excuse, interest follows as an incident." The defendant should, therefore, have been charged with interest on such amount as was found in his hands, belonging to the complainant, from the date of the receipt of the several items making the aggregate so found.

For the error above noted, the decree of the Chancellor, so far as it militates against the views above expressed, is reversed, and the cause remanded; and so far as the decision of the court below is in accordance with the views above expressed, the decree is affirmed. It is further ordered that the defendants in error pay the costs of this court.

GOLDTHWAITE, J., not sitting.

McGONEGAL *vs.* WALKER.

1. To sustain the action for forcible entry and detainer, the plaintiff must show that defendant has forcibly entered his premises, and that he actually detains the possession either by himself in person or by another to whom, after obtaining it by force, he has delivered it to be kept for him; and the fact that the person to whom he delivers the possession had been his tenant before the premises went into the posesssion of the plaintiff, makes no difference.
2. An error in favor of the appellant forms no ground of reversal.
3. The bare removal of plaintiff's fence, if defendant enters peaceably, would not convert his entry or detainer into a forcible one.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. LYMAN GIBBONS.

THIS was an action of forcible entry and detainer, brought by Walker against McGonegal, to regain possession of certain premises described in the complaint, situated in the city of Mobile. The plaintiff, proving unsuccessful before the justice, took the case before the Circuit Court by *certiorari*, in which he obtained a verdict and judgment in his favor.

Upon the trial a bill of exceptions was sealed, by which it appears that the plaintiff introduced one James Murphy, who testified that, while the plaintiff was erecting a fence between his lot and the lot of the defendant, the said defendant came with a party of men, and after using threatening language to the plaintiff, swearing that he would have possession of the lot, and that if he were to serve the plaintiff right, he would split his head, then pulled up the posts and tore down the fence which the plaintiff had erected, and moved the fence so as to take about 16 feet in width by 140 in depth of plaintiff's lot; that at the time of using the threatening language the defendant had an axe in his hand. He also testified that one Blackhall was, and for some time had been, in possession of the lot claimed by the defendant.

Maurice Murphy, another witness, stated that previous to the difficulty there had been an old fence dividing the lots claimed respectively by the parties. The old fence run back from the front about 120 feet, the depth of the lots being about 140 feet;

said fence was very much dilapidated, so that passage could easily be had through it. This witness was present when the defendant came and tore down the new fence, removed the posts &c. to near the line of the old fence, but within such line so as to include two or three feet of the plaintiff's lot between the line of the new fence and the old.

Mrs. James Murphy testified, that she was in the house on plaintiff's lot when defendant and his party came; that the plaintiff had lived in the house some two months; that previous to that time, one Mrs. Cotton had resided there as tenant, but had attorned to the plaintiff; that when the defendant came his language was violent; that he pulled up the plaintiff's fence, and re-constructed it on a different line, and in so doing had taken some sixteen feet of the plaintiff's lot.

Patrick Byrne testified, that the plaintiff had been at work in erecting the fence some two weeks before the defendant came and tore it down; that the plaintiff had completed about 100 feet thereof.

One Flanery testified, that he, with the plaintiff, defendant and other proprietors of adjacent lots, agreed to employ a surveyor to run off the lines of the respective lots, so that each might know where to put his fence; that the several parties interested had deposited money in his hands to employ such surveyor; that he employed one Dean Knox, the city surveyor, who, in the presence of the parties to this suit, and previous to the controversy, surveyed the same, and the line then run between the plaintiff and defendant's lots was that on which the plaintiff was erecting his fence; and that the line on which defendant placed the fence after taking it up, enclosed some 16 feet of the plaintiff's lot, as surveyed by said Knox. Knox was also examined, and sustains Flanery; says the line he run was according to instructions given and descriptions furnished, and that he run the line between the lots of these parties at their request.

One Dalton testified, that Blackhall was in possession of defendant's lot, as his tenant, but never had all the lot as now embraced by the fence; that, in removing the fence, the defendant took two or three feet more than was embraced by the old fence, to which Blackhall previously claimed.

Joshua Kennedy proved, that he had owned both lots, and had sold them to the parties; that the sale to the plaintiff was

prior to that made to the defendant; that the lot of plaintiff, at the time of sale, was occupied by Mrs. Cotton, who was told to attorn to the plaintiff, and who did attorn.

The plaintiff here rested his case.

The defendant then proved by one Blackhall, that he, the witness, had been in possession of a part of the lot in controversy for about fifteen months; that he first rented from Kennedy, and after occupying some time was informed by him that he had sold to McGonegal, and he attorned to the latter; that he has since held the possession as McGonegal's tenant; that some days after the lines were run by Knox, the plaintiff, Walker, informed witness that he intended to tear down the fence that divided said lots, and to run it according to the line as surveyed; this the witness communicated to the defendant, who caused a written notice to be served upon the plaintiff, forbidding his doing so; that soon after this, the plaintiff tore down the old fence, and part of a stable situate on the premises which the witness had in his possession, and began to construct the fence on the line run by Knox; that the defendant, in company with three persons, came to the place while the plaintiff was building the fence—pulled up the posts, and put them over on plaintiff's lot, and re-constructed the fence where the old one had run; that the fence run one hundred and twenty feet, the lot being one hundred and forty feet deep; that after the plaintiff removed the fence, witness lost possession of a portion of his lot, but when the defendant re-constructed the fence on the old line, he regained possession and has ever since held it.

Another witness testified, that he went upon the ground when defendant pulled up the posts, and that said defendant used no violent language or violence upon the occasion.

It was also proved by Muchi and McVatal, that they went with McGonegal when he took possession; that he used no threats or harsh language to the plaintiff or any one else; that when the defendant got upon the ground, Walker was at work, putting up the posts; McGonegal said to him in a quiet manner, "You are busy at work; it is useless for you to put that fence up, for I am going to take them posts up and put them over on your own ground. You have already been notified not to touch the fence, that I was in the peaceable possession of this ground, claiming title to the same;" that Walker replied, "Very well,

that is all I want you to do. I will see further about it," and then walked off and left the premises. They also state that McGonegal had no weapons.

The circuit judge charged the jury, that if the parties to the suit were proprietors of adjoining lots, between which the piece of land in dispute was situated, and that the boundary line between said lots was undefined, and the ground upon the line was used as common property by the mutual proprietors, and they agreed to call upon a surveyor to give them their lines in order to fix the exclusive possession of each, and that those lines, so to be ascertained, should determine the exclusive possession of each, and that if, in pursuance of such agreement, a survey was had, and that the plaintiff had gone into the exclusive possession of the ground now in dispute according to the line ascertained by said survey, and being so in possession, the defendant entered upon him and turned him forcibly out of possession, then the defendant was guilty; but if, on the other hand, the possession of the tenants holding the said lots prior to the purchase by plaintiff and defendant from Kennedy, was one well defined by a fixed boundary line, and that the plaintiff and defendant took the possession of the property as it existed with the tenants at the time of their purchase, and that the possession exists now as it existed in the tenants occupying the premises before them, then the defendant is not guilty.

2. The court charged the jury further, that if the possessions of Mrs. Cotton and Blackhall were fixed by a definite line, then neither the plaintiff nor defendant had a right forcibly to disturb the possession of the other, and if he did he would be a trespasser; that if Walker, in building his fence, violated the possession of Blackhall, the tenant of MoGonegal, the latter had a right to stop the trespass by force, even before it was consummated, and restore the old lines, and if the defendant did this only, he was not guilty. On the other hand, if the new fence put up by the defendant was not upon the old line, but encroached upon the plaintiff's lot, then the defendant was guilty to the extent of that encroachment.

3. That if the plaintiff, under the evidence and the law as above given in charge, was entitled to the possession of the premises in dispute, or any part of them, then the moving of the plaintiff's fence in the manner shown by the proof was suf-

ficient force to maintain the action; but, on the other hand, if the defendant was entitled to the possession, the removing of the plaintiff's fence by the defendant as shown in proof, was justifiable as repelling a trespass not then consummated.

4. The defendant's counsel asked the court to charge the jury, that if they believed Blackhall was in the possession of said lot of defendant, prior to his purchase from Kennedy, and that said Blackhall attorned to defendant upon said purchase, and that defendant was not otherwise in possession of said premises, then, although they should find that the defendant, as landlord of said tenant, had forcibly entered and ejected said plaintiff, yet, if he immediately gave up the possession thereof to his tenant, who has held the same ever since, the action should have been against Blackhall, the tenant in possession, and will not lie against the defendant. This charge the court refused to give, and instructed the jury that, under the evidence, the action was against the proper party.

To the several charges given, and to the refusal of the court to charge as requested, the counsel for the defendant excepted, and here assigns the same for error.

Wm. Boyles, for plaintiff in error:

The action is founded on the statute in Clay's Digest 250 § 2. The evidence shows that McGonegal had not the possession, nor the right of possession; the lot was held by his tenant, and that, too, under a contract of lease entered into long before his entry, and then not ended. It was held by said tenant, who had the actual possession, at the time of demand made, and at the time suit was brought. To constitute the offence of forcible entry and detainer, there must be a detainer, as well as an entry. The action is merely for the possession, and cannot be maintained against any one who has not the actual possession.—6 J. J. Marsh. 602; 3 A. K. Marsh. 128; 3 Halstead 48; 5 Gilman 218; 2 Dana 245; 9 Ala. R. 509.

Though the possession of the tenant is, in contemplation of law, the possession of his landlord, yet the tenant alone, during his exclusive tenure, is actually possessed: he alone can sue in trespass, for an intrusion on the possession, and consequently would be entitled to the restitution of possession after disseizin, and the landlord could not maintain the warrant in his own

name.—6 J. J. Marsh. 602. It follows necessarily that the action cannot be maintained against one, when another has the actual possession. If McGonegal had held the actual possession at the time of demand made, or suit brought, and afterwards his tenant had taken possession before a writ of restitution issued, then the sheriff could have legally turned him out, but not otherwise.—2 Bay's R. 355. McGonegal was, at most, but a trespasser, and might have been so treated.

The first charge is not predicated upon the evidence. It assumes, in effect, that there was no defined line between said lots, when, in point of fact, all the witnesses who spoke of the old fence say, that it extended back 120 feet, and that Blackhall, the tenant, had and held the possession to said fence, until it was torn down by Walker; and Blackhall testified, that it was the recognized line between said lots. Another objection to the charge is, that, in effect, it asserts that, if A enters upon B's premises, and forcibly turns him out of possession, he is guilty of a forcible entry *and detainer*, though he does not hold the possession for a moment, but walks off immediately and remains away.—See 2 Douglass' R. 368, 372; 1 Caine's R. 125; Clay's Digest 250 § 2.

The third charge refers to the jury the decision of a question of law.—3 Ala. R. 237. There was a conflict in the evidence, in regard to the manner of removing the posts by McGonegal; yet the court charged, that the removal of the posts, in the manner shown by the proof, was sufficient force to maintain the action. Would it have been sufficient, supposing the evidence adduced by the defendant to be true?

The charge asked by defendant's counsel should have been given.—5 Gilman's R. 218; 2 Doug. R. 368; *ib.* 372.

The case of Matlock v. Thompson, 18 Ala. R. 600, and the authorities there cited, have no application to this case; that action was founded on the act of 1848, for a forcible and unlawful detainer.

Percy Walker, *contra:*

The record shows that, when the proceeding before the magistrate was instituted, McGonegal held the lot in his own possession. These proceedings were read on the trial below, and are made part of the bill of exceptions. In addition to this, the

testimony adduced by the plaintiff below shows, that McGonegal forcibly entered on the premises, and detained them. The testimony of Blackhall shows, that McGonegal treated the possession as his own. The evidence must be regarded as establishing the fact that McGonegal forcibly entered the premises; and his refusal to surrender, upon demand, must be held to constitute a forcible detainer under the statute. It is admitted that, when the entry is peaceable, the mere refusal to surrender on demand will not constitute a forcible detainer; but, it is insisted, that such refusal, after an entry with force, will maintain the action. After such an entry, the bare retention of possession will be a retainer.—5 Gilman 222. The refusal to surrender, after the circumstances of the entry, tended to excite terror in the plaintiff, and prevent him from maintaining his rights.—10 Mass. 403.

The reconstruction of the fence (as it is termed) by the defendant, after his expulsion of the plaintiff, shows that he must have continued in possession, and there is every presumption in the record that he held the actual possession at the time the summons issued. The substitution of a tenant, after the acts of force, will not defeat the action.—2 Bay's R. 355.

That the court did not err, as to the question of force necessary to sustain the action, see Clay's Digest 250 § 2; 9 Ala. 509; 18 Ala. 600.

The agreement between the parties to have their lots surveyed shows that the old line was undefined, and therefore the first charge of the court below was correct.

The third charge is not obnoxious to the objections made by plaintiff in error, and bears no analogy to that given by the court in Pharr & Beck v. Bachelor, 3 Ala. 237. In the charge complained of, there was no conclusion of fact from a question of law, nor any reference of the law to the decision of the jury. The charge is, in effect, that, upon the law as previously charged, if the jury believed from the evidence that the plaintiff was entitled to the possession, then the moving of the fence &c. was sufficient to maintain the suit. The charge may, perhaps, be an ungrammatical arrangement of words, but it is not a legal error.

The court properly refused to give the charge asked, as it had no sufficient predicate in the evidence.

CHILTON, C. J.—1. In order to sustain the proceeding of forcible entry and detainer, the plaintiff must show that the defendant has entered upon his premises *forcibly*, and that he actually detains the possession from him. The detainer need not be by the defendant in person; he may detain by another, to whom he delivers the possession, after he has obtained it by force, to be kept for him; nor does it make any difference that the person to whom he delivers it had been his tenant before the premises went into the possession of the plaintiff.

There was, therefore, no error in refusing to give the instruction prayed for by the defendant in the court below.

2. As to the first charge which the court gave, it is only necessary to remark that, if it is erroneous, that error consists in denying a right to the plaintiff to recover, if the parties purchased with a well defined and fixed boundary line between them, and now hold as they did then. It may well admit of question, whether, if the plaintiff had peaceable possession of land not included in the fixed boundary on his side, the defendant could forcibly enter and dispossess him, without being subject to this remedy. But this point is not before us. The error, if there be one, was in favor of the plaintiff in error, and consequently forms no ground of reversal, as no injury could properly have resulted to him from it.

The counsel supposes this charge to be abstract, as it assumes there was no defined line between the lots claimed by the parties; but we think the objection not well founded. It was for the jury to determine whether, if there had been a well defined boundary line between them, they would have contributed their money to have a survey made to ascertain the true line.

3. The circuit judge, however, mistook the law in charging the jury that, if they believed the plaintiff was entitled to the possession of the premises, then the removal of the plaintiff's fence by defendant, in the manner shown by the proof, was sufficient force to maintain the action. The bare removal of the fence, if the defendant had entered peaceably, would not convert his entry or detainer into a forcible one. The fence is a fixture, and in law considered as a part of the realty, and was not in the contemplation of the legislature when it was declared that "the carrying away of the *goods* of the party in possession" should constitute sufficient force to confer this remedy.—

We do not undertake to decide whether the evidence was or was not sufficient to show that the defendant entered forcibly. The proof upon this disputed fact was conflicting, and the weight of the testimony was a matter solely for the jury; but this charge withdraws from them its consideration, and the court determines, as a matter of law, that the removal of the fence, as the same was shown by the proof, was sufficient force to entitle the plaintiff to his remedy, if he was entitled to the possession. This point is not unlike that decided in Botts v. Armstrong, 8 Por. Rep. 57, in which the court held, that "where the consideration of the evidence showing the circumstances connected with the entry of the defendant, is taken from the jury by the charge of the court, the cause must be remanded."

There was proof *conducing* to show that no such force or violence was used as is required to sustain this action, and however strongly it may have been opposed by other proof, still it was for the jury to determine its weight, and the court committed an error in virtually withdrawing it from them.

Let the judgment of the Circuit Court be reversed, and the cause remanded.

GIBBONS, J. did not sit in this case.

TALIAFERRO *vs.* LANE.

1. An attachment does not lie, under the statutes of this State, against a domestic executor or administrator, whose testator or intestate at the time of his death was a resident of this State.
2. Such an attachment, when issued by a justice of the peace, is not merely voidable, but void, and operates no lien on the property attached.
3. On the trial of a claim suit under the statute, the record of the plaintiff's judgment against the defendant in execution, is irrelevant and inadmissible.

ERROR to the Circuit Court of Limestone.

Tried before the Hon. THOMAS A. WALKER.

George W. Lane, the defendant in error, sued out an attachment before a justice of the peace, returnable to the Circuit Court, against John T. Menifee, as administrator of Hickman Lewis, deceased, on a debt due to him from the intestate. The attachment was levied on a negro boy, and R. M. Taliaferro, the plaintiff in error, interposed a claim under the statute, as trustee for the children of said Lewis, under a deed of gift from Mrs. Crabb, their grandmother.

Menifee, the administrator, pleaded *non assumpsit*, and the insolvency of his intestate's estate. The first plea was found against him by the jury, and the second in his favor, and thereupon judgment was rendered against him, under the statute, to be levied of such property belonging to the estate of his intestate, as might afterwards come to his hands as administrator.

On the trial of the claim suit, the plaintiff offered to read to the jury the writ of attachment under which the slave had been seized; to which the claimant objected, but his objection was overruled, and he excepted. Plaintiff also offered to read the judgment in the attachment suit, but claimant objected; the objection was overruled, and claimant excepted.

The claimant offered to read in evidence to the jury the deed from Mrs. Crabb to her grandchildren, under which he claimed as trustee; the plaintiff objected to the reading of the deed, because it conveyed the legal title to the said children of Hickman Lewis, and not to the claimant as their trustee. The court sustained the objection, and the claimant excepted.

"The claimant then offered to read said deed to the jury, as evidence tending to show such a special property in, and right of possession and control over said property, as would entitle him to recover against any one not having a title superior to that of said children. To the reading of it for this purpose, the plaintiff also objected, and the court excluded it; to which the claimant excepted."

Among the several charges requested by the claimant, the following was asked and refused: "That the attachment sued out against the administrator of Hickman Lewis did not operate a lien upon the property of the deceased;" and to the refusal to give it the claimant excepted.

The errors now assigned embrace the several rulings of the court above set forth, to which exception was taken.

Robinson & Jones, for plaintiff in error.

No counsel appeared for the defendant.

LIGON, J.—The first question arising out of the errors assigned in the record before us, relates to the action of the court below in allowing the attachment in the case of Lane v. Menifee, administrator of Hickman Lewis, dec'd, to be read to the jury. It was on the levy made under this process that the claim of the plaintiff in error was interposed; and it is here contended that the attachment, being issued against the estate of a person who was a resident of this State at the time of his death, and whose administrator is appointed by the courts of this State, and amenable to them on his bond, is issued without authority of law, and is consequently void.

This attachment appears to have been issued by a justice of the peace, on the oath of the plaintiff, "that John T. Menifee, administrator of Hickman Lewis, deceased, is justly indebted to George W. Lane, in the sum of five hundred dollars, as administrator of Hickman Lewis, deceased, and that the said John T. Menifee is about to remove the property of said Hickman Lewis out of the State, and thereby the plaintiff will have to lose the debt, or have to sue for it in another State."

The proceeding by attachment is strictly statutory, and the writ can only be issued in such cases as are clearly authorized by the law creating and allowing it. The courts are not permitted, in such cases, to extend the provisions of the law by construction, so as to make them include cases and persons which are not clearly within their meaning. If, upon an examination of the condition of the parties, all the rights and remedies secured to suitors, under the law authorizing the writ, do not or cannot attach to them, it would seem to be evident that they are not included in the act, and, consequently, the officers who are allowed to issue the writ in proper cases, would be without authority to issue it in those not named.

We have no statute expressly authorizing the issue of attachments against the estates of deceased persons, except in case of the death of a debtor residing out of the State, having property here, and the creditor is a resident of the State.—(Clay's Dig. 58 § 14.) Our general attachment law gives no express authority so to proceed against domestic administrators or executors,

nor can we see any good reason why it should be allowed. The domestic administrator, before he enters upon the discharge of the duties of his office, is compelled to give bond, with sufficient security, in double the amount of the estate which comes to his hands as such, conditioned for the faithful discharge of the duties of his office. If he waste the estate of his intestate, or fail to apply it to the payment of the debts, the creditor has an ample remedy upon his bond; and this is a sufficient protection, without allowing him to interfere with the due course of administration by suing out an attachment, and thus depriving the administrator of the assets to be used by him in the manner required by law.

Again; if such course is tolerated, it would tend, in many instances, to defeat the operation of other statutes in relation to the estates of deceased persons. If an estate is insolvent, the law does not prefer one creditor over another, but provides that the funds arising from the assets in the hands of the administrator, shall be brought into court to be divided *pro rata* among the creditors. By this statute, the administrator in chief is allowed a longer period to ascertain the true condition of the estate of his intestate, than the creditor is debarred from the privilege of suing him on his claim. In such case, if the creditor were allowed to attach the goods of the intestate in his hands, what is to hinder him from suing out an attachment, and causing it to be levied on property sufficient to satisfy his demand, before the report of insolvency is made, thus obtaining a specific lien on such property, which cannot be affected by the subsequent report of insolvency, and thereby acquiring an advantage over other creditors, whose demands are as meritorious as his own?

Another difficulty to such a construction of the attachment laws, arises out of those laws themselves. The thirty-second section (Clay's Dig. 61) provides, "that whenever any original attachment shall have been wrongfully or vexatiously sued out, the defendant therein may, at any time, commence suit against the plaintiff suing out the same, and recover any damages which he may have sustained, or to which he may be entitled on account thereof, whether the suit by attachment be ended or not." To whom, it may be asked, would this right to sue belong, in cases like the present? Certainly not to the intestate, who is the only debtor of the plaintiff in attachment, and to whom

no right of action could accrue for a wrong done after his death; and assuredly not to the administrator, for he has sustained no individual injury or damage by the attachment having been sued out. It results that, in such case, this clause of the attachment law would become wholly inoperative; and we can scarcely suppose, that the legislature intended to provide an extraordinary and summary remedy for creditors, for the abuse of which it gives an action against them in favor of the party injured, and yet allow it to be used in cases in which the redress for the abuse cannot be enforced against them.

This court, however, has, in effect, already decided that domestic administrators cannot be proceeded against by attachment. On repeated occasions it has been held, that where a statute creates a new and summary remedy against persons standing in a particular relation to each other, such remedy will be allowed only as against those specially described in the statute; and that such proceedings can only be sustained, where the record shows every fact necessary to support the jurisdiction of the court.

Thus, in the case of Logan v. Barclay, 3 Ala. R. 361, the proceeding was commenced, under the statute, against a constable, for failing to make the money on an execution which came into his hands, and he died pending the suit. This court held, that it could not be revived against his administrator, because the law authorizing such summary remedies against the constable himself did not, in terms, extend it to his executors and administrators.

So, in the case of Murphy's Adm'r v. Br. Bank at Mobile, 5 A. R. 421 and 465, which was a summary proceeding under the statute which authorizes the Banks to obtain judgment on motion against their debtors, it was held, that the remedy did not lie against the executor or administrator of such debtor, because he was not expressly named in the statute.

So, also, in the case of Dumes v. McClosky, 5 A. R. 239, which was a proceeding under the act of 1834, in relation to the collection of rents in the city of Mobile, which allows the landlord to levy his rent by warrant of distress against his tenant, this court ruled, that such proceeding could not be maintained against the administrator of a tenant who died during his term, leaving rent in arrear.

That statute enacts, "that whenever any landlord, his agent or attorney, shall make complaint on oath, to any justice of the peace, in the city of Mobile, that any person is indebted to him, for the rent of any tenement within the corporate limits of the city, and shall enter into bond and security in four times the amount of the rent alleged to be due, conditioned to pay the defendant all costs and damages for the wrongful suing out of the warrant hereinafter mentioned, it shall be lawful for the justice of the peace to issue his warrant, returnable before him not less than four, nor more than ten days from the time the warrant shall be issued, directed to any constable of the city, requiring him to sieze and take into his possession any goods and chattels which may be found in the tenement for which the rent shall be due," &c. In construing this statute, the court says, after having noted other objections to the judgment :— "But there is a more formidable objection than this to this proceeding, which is, that it will not lie against the representative of the tenant, but must be prosecuted against him individually. This is a summary remedy, and, according to all our decisions upon this class of cases, cannot be extended by construction beyond its terms.

To permit it to lie against the personal representative, after the decease of the tenant, would be attended with mischievous consequences, which it is not necessary to enumerate, as the action is not given after the death of the tenant."

The analogy between the provisions of this statute in respect to tenants in Mobile, and that of our attachment laws in respect to debtors as to whom the process of attachment may issue, is noted by this court, in the case of North v. Eslava, 12 Ala. 240, in which, after pronouncing the proceeding as one *in rem*, the object of which is to give the plaintiff a lien on the goods of the tenant, the court says: "We do not perceive any reason why suits commenced under this statute should differ from those brought under the general attachment law." There is, in fact, no difference as to the lien obtained by the proceeding, nor in the summary character of the remedy allowed, and there is certainly no sensible reason why the one should be more extended by construction than the other, as to the party against whom it may issue.

In the case of Loomis v. Allen, 7 Ala. 706, it was held, that

"our statute authorizing attachments in favor of a resident citizen, against the executor or administrator of a non-resident debtor, can only be levied on the property of the deceased within this State, which has not come into the possession of the personal representative, so as to be assets in his hands." And in Hemingway v. Moore & Crenshaw, 11 Ala. 645, in which a foreign creditor sought, by process of attachment, to charge the property of a foreign debtor, which was found in this State, with the payment of his debt, (the administrators of said decedent being also non-residents,) the court held, that these facts appearing on the face of the proceedings, the attachment was rightly quashed on motion. The reasons given are, that the terms of our act authorizing attachments against foreign executors and administrators, limit the remedy to resident creditors, and that the act of 1824, (Clay's Dig. 57 § 9,) giving non-resident creditors the benefit of our attachment laws against non-resident debtors, was not intended to give them the benefit of this particular law. And the court further says, that if the property, even in case of non-resident executors, had ever come to their possession, it would not be subject to attachment at the suit of resident creditors.

If, in the case of non-resident executors, an attachment will not lie after they have reduced the property sought to be charged by the attachment into possession, it is clear that the attachment cannot be upheld, when issued against a resident executor or administrator, who, it is shown by the attachment itself, has the possession of the property at the time of its issue; and such is the case under consideration.

2. Is such attachment void, or voidable only? If the latter, then it can be attacked only in a direct proceeding. If the former, it may be attached collaterally.

In this State, justices of the peace have no civil jurisdiction, except such as is conferred on them by statute. When they pretend to act in matters over which the statute gives them no authority, all such acts are *coram non judice*, and void. They cannot be regarded as errors or irregularities, for these terms imply departures from the rule of proceeding, or mistakes of law in the progress of the case, in a court having rightful jurisdiction of the subject matter of controversy; and when they are found to exist, they can only be corrected by appeal, or

writ of error, or some other direct proceeding in the case in which they occur.

Our attachment law does not, by its terms, authorize a justice of the peace to issue a writ of attachment against a domestic executor or administrator, and such process, issued by him, is merely void, and its levy can operate no lien in favor of the party suing it out, or justify the levy made under it.

It follows, from what has been said, that the attachment in favor of Lane v. Menifee, administrator of Lewis, is void, and should not have been permitted to be read to the jury, for any purpose, in the court below.

3. It was also error to allow the judgment in the attachment suit to be read in evidence to the jury, when it was objected to by the claimant. It was wholly irrelevant to the issue, and could only tend to embarrass the case, and, perhaps, mislead the jury. The validity or invalidity of the claim of the plaintiff in attachment, against the estate of Lewis, could not arise on the trial of the right of property, as it formed no part of the issue, nor had the claimant of the property the right to controvert it; consequently, the judgment could prove no fact involved in the trial, and should not have been read, when it was objected to.

4. The charge refused by the court should have been given. We have seen that the attachment, under which the levy was made, is void as a process, and consequently its levy created no lien in favor of the plaintiff in that suit. We have already held, that to justify the trial of the right of property, under our statute, the property must be levied on by a valid process in the hands of the proper officer.—Braley v. Clark, 22 Ala. 361.

The judgment of the court below must be reversed; and as the points decided are conclusive of the case, both in this court and the court below, it is unnecessary to remand it.

LAY'S EXECUTOR *vs.* LAWSON'S ADM'R.

1. In an action at law between the administrators of two estates concerning the title to slaves, a woman who was the widow of both of the decedents is an incompetent witness for the administrator of the estate which has the smaller number of distributees.
2. When a witness who is shown to be incompetent on his *voir dire*, is nevertheless allowed to testify, facts proved by him on his examination in chief cannot be looked to for the purpose of curing the error.
3. The requisition of the statute regulating sales by executors and administrators, which prescribes that the purchaser shall give "bond with approved security," (Clay's Digest 223 § 13,) is directory only, and not mandatory; and the failure to observe it does not render the sale void.
4. When an order of sale made by the Orphans' Court does not on its face appear to have been granted on the application of the administrator, that fact will be presumed after the lapse of twenty years.
5. A purchaser at an administrator's sale, who does not give bond with approved security as required by the statute, but takes possession of the property, holds adversely to the administrator, and may acquire a perfect title under the statute of limitations of six years.
6. A bailment terminates when the objects for which it was made are accomplished, and it then devolves on the bailee to return the property; and if he fails to do so, he is liable for damages in detinue without a special demand.
7. In detinue for a slave, a plea alleging the slave's death since the last continuance is bad on demurrer.
8. Adverse possession for the time prescribed as a bar by the statute of limitations, may be given in evidence under the plea of the general issue in detinue.

ERROR to the Circuit Court of Greene.

Tried before the Hon. ANDREW B. MOORE.

DETINUE by Alexander Lawson, as administrator of Elijah Lawson, deceased, against Thomas T. Tyree, executor of Amos Lay, deceased, for several slaves, one named Isaac, another named Martha, and the others her children. The defendant pleaded: 1. *Non detinet;* 2. The statute of limitations of six years; 3. That the slave Martha had died since the last continuance. The plaintiff joined issue on the first plea, replied specially to the second, and demurred to the third; and the demurrer was sustained. It is unnecessary to notice the other pleadings, as they do not enter into the opinion of the court.

On the trial, the plaintiff introduced Elziabeth Lay as a witness, who testified, on *voir dire*, that she was the widow of said Elijah Lawson, deceased, and had by him three children then living; that said Lawson died in 1828, in Greene County, Alabama; that in 1832 she married said Amos Lay, the defendant's testator, who had children then living by a former wife, and that she had three children by him, all of whom were living; and that the estate of neither of her said husbands had been declared insolvent. Upon this state of facts, the court decided that she was a competent witness, and the defendant excepted.

Upon her examination in chief this witness testified, that at the death of her first husband, said Lawson, she was left with three small children, the oldest seven, and the youngest three years of age; that in 1828 Sanderson, his administrator, sold at public auction, to the highest bidder, the girl Martha, who was then about six years old; that she became the purchaser at this sale, and took the girl Martha into her possession, claiming her as her own property, and kept her until her marriage with Lay in 1832; that said girl went into Lay's possession on his marriage with witness, and was held and claimed by him from that time until his death, which occurred in Greene County, Alabama, in 1851; that said girl then went into the possession of the defendant, as his executor; that the other slaves now sued for, except Isaac, were the children of said Martha; that upon said sale and purchase of said Martha, witness did not give bond with approved security for the purchase money, nor did she give any note or obligation in writing; that the administrator did not ask or require any at the time, nor has he since asked or required any; that she has never paid the purchase money of said slave, nor has she ever been asked to pay; that said Sanderson continued to act as administrator of said Lawson until his death, which occurred in 1834, never having made a final settlement or distribution of said estate; that the slave Isaac was the property of said Lawson at the time of his death, and was never sold by said administrator, but was left by him with witness to help to raise and support her said three children by Lawson; that said administrator had never demanded said slave either of her or her second husband, Lay, and that said slave was so held until the death of said Lay.

The plaintiff also proved, that there had been no administra-

tion on the estate of said Lawson from the death of Sanderson, in 1834, until August, 1851, when letters of administration *de bonis non* were granted to plaintiff.

It was further proved that said order of sale, under which said Martha was sold, was made after the grant of letters of administration to said Sanderson, and was as follows:

"ORPHANS' COURT, September Term, 1828."

"Ordered by the court that Lemuel G. Sanderson be authorized and required to expose to sale so much of the personal property belonging to the estate of Elijah Lawson, deceased, as shall be sufficient to pay the debts due from said estate, on giving such notice by advertisement as the law requires, on a credit of six months, to the highest bidder at public vendue, except the crop, and that he permitted to sell that at public or private sale as to him may seem best."

Upon this state of facts, the court charged the jury, that, if Mrs. Lay failed to give bond or note with approved security, for the girl Martha, it was not a compliance with the terms of sale, and the sale was void as against the plaintiff, and that the statute of limitations interposed no bar to a recovery; that, as to the slave Isaac, no demand previous to the issue of the writ was necessary to entitle the plaintiff to his right of action; but, unless he made such demand, he was only entitled to hire from the issue of the writ. To this charge the defendant excepted, and asked the court to give several other charges, which it is unnecessary to set out, as the opinion is based on the charge given.

The rulings of the court upon the pleadings and evidence, as above shown, and the charges given and refused, are here assigned for error.

S. F. HALE, for plaintiff in error:

1. Elizabeth Lay, being the widow of Elijah Lawson, deceased, and a distributee of his estate, was incompetent on the ground of interest to testify for his administrator; and her interest appearing, the party offering her must show that her interest is balanced; and this is not done by showing that she was also the widow of defendant's testator, and that she had three children by each husband, especially when it appears that her last husband, against whose estate she is offered, has other children living.—10 Ala. 900; 6 Ala. 656.

2. That part of the statute which requires purchasers at administrators' sales to give "bond with approved security," (Clay's Digest 223 § 13,) is directory merely, and not mandatory; and therefore the sale made by Lawson's administrator in 1828, being under an order of the Orphans' Court, at public auction, after notice given as required by law, (if, as insisted by defendant in error, the administrator delivered the property to the purchaser,) was a good act of administration, and divested the estate of the title to the girl Martha: it was not rendered void by her failure to comply with the terms of the sale, by giving bond with security. Such was the doctrine held applicable to sheriffs' sales, who, like administrators, are only authorized to sell for the purposes and under the restrictions imposed by law.—3 Strobh. 217; 8 Ala. 153. If that clause be held to be mandatory, it must be strictly pursued, and no substitute to which the parties may resort can be effective to pass the title, although the interest of the estate may be equally protected in the particular case.—Humphries & Wier v. Davis, 4 Ala. 443, where it was held, in a case where the administrator had sold the property at private sale, in violation of the inhibition of the statute, that the sale was void, and conveyed no title, although the interest of the estate was fully protected, the property having been sold for a full price, the purchase money received, and applied in due course of administration. But we hold, that this question has, in effect, been passed upon, both by this court and in Mississippi, where a like statute is in force. In Kavanaugh & Wife v. Thompson & Wife, 16 Ala. 817, where an administrator had sold property at private sale, it was held, that he was chargeable on final settlement, at the election of the distributees, with the value of the property, because by his illegal act he had been guilty of a conversion. But in Dean & Wife v. Rathbone's Adm'r, 15 Ala. 333, where the administrator had sold the property, and permitted it to be carried out of the State, and six months afterwards took the bond of a third person, with security, which proved insolvent, this court held the administrator not chargeable on final settlement with the amount so lost, because, as the court held, he had acted in good faith and with due diligence. But, if this provision of the statute is mandatory, his failure to take bond and security from the purchaser, upon the delivery of the property, was a violation of

law, and, under the decision of Kavanaugh v. Thompson, *supra*, would have rendered him liable, at all events, for any loss which the estate might sustain thereby. Again; if that clause of the statute is mandatory, a sale contrary to its provisions is void.—Fambro v. Gantt, 12 Ala. 298; Smedes' Digest 255 § 218. And the vendee, although in possession of the property, can resist the payment of the purchase money. But in 1 Smedes & Mar. Ch. 172, where the administrator had taken the notes of a third person, endorsed to him, upon the sale of property belonging to the estate, the court held that the payment of the purchase money could be enforced, and set up a statutory lien on the property for that purpose, which could not have been done if the sale were void. And this court has often held that a purchase by an administrator at his own sale, where it is impossible in the nature of things that bond with security can be given by the purchaser, is valid, and vests the title to the property in the purchaser.

3. As we understand the facts disclosed in the bill of exceptions, Sanderson did not consent that Mrs. Lawson should take possession of the girl Martha, or in any way waive his rights in that behalf; nor was it submitted to the jury to find how the facts were in this respect, but the charge of the court was upon grounds wholly independent of any considerations of this kind, and rested simply upon the fact that the purchaser did not comply with the terms of the sale. The administrator, then, having sold the property in comformity with the provisions of the statute, and done nothing, so far as the record discloses, to estop himself from suing the purchaser, either for the purchase money or the slave, if she failed or refused to comply with the terms of the sale, a right of action then accrued to him.—3 Strobh. 217; 8 Ala. 153. And as the statute of limitations then commenced to run against him, the slave being thereafter held adversely to him and all others, it was not arrested by his death in 1834.—3 Stewart 180; Lee v. Leachman, 22 Ala. 452.

4. At the time of the marriage of Amos Lay with Mrs. Lawson, in 1832, she was holding and claiming the slave Martha as her own property, and by virtue of the marriage he became, in law, a *bona fide* purchaser of the property for valuable consideration, and without notice, and is therefore entitled to protection.—Sterry & Wife v. Arden, 1 Johns. Ch. 261.

5. The statute of limitations not only bars a recovery of personal property, but, in favor of a *bona fide* purchaser, absolutely changes the title thereto.—Howell v. Hair, 15 Ala. 198; Jones v. Jones, 18 Ala. 253, and cases there cited. It may, therefore, be well set up by way of plea, or relied on as a muniment of title under the general issue; and in this case, the record shows that there was no demurrer to plaintiff's second replication to the plea of the statute.

6. If it were true, as contended by defendant in error, that the sale by Sanderson to Mrs. Lawson was illegal and void, then it did not divest Sanderson of the legal title to the property, for a void act cannot divest any one of title; and being held and claimed by Lay, a *bona fide* purchaser for valuable consideration without notice, as his own property, in opposition to Sanderson's legal title, and adversely thereto, from the time of his marriage in 1832, his title will be perfected by the mere lapse of time, (Howell v. Hair, *supra;*) and the fact that Sanderson had, by his own voluntary illegal act, created an estoppel to a recovery by himself, cannot deprive a *bona fide* purchaser of his legal right to have his title perfected by lapse of time, or bring the case within any of the exceptions of the statute; and courts will not extend these exceptions.—1 Cowen 356; 16 Wend. 572; 17 Ala. 372.

7. The Orphans' Court has plenary jurisdiction over the subject matter of estates of deceased persons; and having jurisdiction, its orders will be presumed to be correct, especially after the lapse of more than twenty years.

8. As to the slave Isaac: Detinue will not lie to recover a slave hired out to continue in the service of the hirer until demanded, without a special demand.—1 Stewart 254; 13 Ala. 376; 4 Dev. & Bat. 354.

9. The unlawful detainer, and not the original taking, is the gist of the action of detinue; and therefore damages can only be recovered from the date of the demand, or from the bringing of the suit if no demand is made.—Tunstall v. McClelland, 1 Bibb 186; 3 Porter 279; 5 Ala. 304; 5 Dana 34; 2 Texas 130.

10. The record discloses that the last charge asked by defendant below, was in reference to the hire of the slave Isaac, and asserting, as it does, a correct legal proposition, it should have been given.

11. No supposed defect in the order of the Orphans' Court for the sale of the property, can avail the defendant in error, because, in his fifth replication to defendant's plea of the statute of limitations, he concedes the regularity of the order, and relies alone upon the purchaser's failure to comply with the terms of the sale.

12. In answer to the point made by defendant's counsel in reference to the pleadings, it will be seen from an examination of the record, especially the judgment entry, that there is no demurrer to the plaintiff's second replication to the plea of the statute of limitations, but issue thereon.

R. H. Smith, *contra :*

Mrs. Lay was a competent witness. The objector must show that the witness offered has a present, certain, vested interest against him ; if the interest is of a doubtful character, the objection only goes to his credit. The witness being always presumed competent, it is the duty of the objector to show him incompetent; and if he fails satisfactorily to establish it, the witness is to be sworn.—1 Green. Ev. 390 ; 3 Porter 433 ; 3 Gill & J. 357 ; 6 Ala. 648. When the whole ground of objection is based on what the witness says, all he says must be taken together.—1 Green. Ev. § 422. On the most favorable view for the plaintiff in error, neither the court nor the witness could tell which way her interest was. It might take one half of the recovery to pay Lawson's debts, while none of the property might be required to pay Lay's debts; and thus her interest might be with defendant below, although there were more distributees of Lay's estate than of Lawson's. Therefore, the objector should have shown more than he did. Taking all the witness said together, the uncertainty of interest is still more apparent. Both estates were solvent, but to what extent, or whether they would close solvent, could not be told.

But the interest of the witness was adverse to the defendant in error. If Lawson's estate recovered, the witness would lose all share of it as a distributee of Lay's estate, of course ; but if Lay's estate succeeded, she would get a share of it, or its value, in this way: the property remaining part of Lay's estate, she would get her share of it; Lawson's administrator could make Sanderson account for the *devastavit*, and the sum obtained

would, in part, be received by her as distributee.—Clay's Dig. 221 § 4. Again; should Lawson's estate recover, Lay's executor could, by bill in chancery, enjoin her share in it from Lawson's estate, on the ground that she should not injure the estate by her own wrong, and on the ground that she received the property and should not participate in the fruits of her own wrong.—Weir v. Davis, 4 Ala. 446. This would be so, unless this right was obliterated by her marriage with Lay. If it was, it is shown above that, by plaintiff's failure to recover, she would get distribution from both estates; if the right was not destroyed by marriage to Lay, as said, she would be enjoined, and prevented from participating in the fruits of the recovery; and this too shows how uncertain, remote and contingent the interest of the witness is either way.

As to the merits of the case: The statute of 1809, (Clay's Dig. 223 § 13,) is not directory, in requiring that the administrator shall take bond with security from the purchaser. If so, every provision, except the prohibition against selling at private sale, is directory; for, by the same language, in the same sentence, it shall be his duty to apply to the court for and obtain an order of sale, and, on selling, take the purchaser's bond with approved security. The following authorities, however, show that the order of sale, and of course taking bond and security, are requisite to a valid sale.—Ventress v. Smith, 10 Peters 173; Weir v. Davis, 4 Ala. 444; Dearman v. Dearman, 4 Ala. 526; Swink's Adm'r v. Snodgrass, 17 Ala. 652; Fambro v. Gantt, 12 Ala. 298; Steger v. Bush, 1 Sm. & M. Ch. R. 188. Upon this statute the Supreme Court of Mississippi have made the same decision in many cases.

It is said, however, that Steger v. Bush, *supra*, holds the sale voidable only; but this is not the principle upon which they hold that the statutory lien of Mississippi could be enforced: it is, that the purchaser is estopped from setting up the illegality of the sale. But foreclosing the mortgage is not suing on the debt; it is a proceeding *in rem*, to subject certain property because of a lien.—Harbin v. Levi, 6 Ala. 399. Fambro v. Gantt may be opposed to Harbin v. Levi; but it is unnecessary to consider whether it is or not, though I think the two cases reconcilable. It is enough, however, to show on what principle Steger v. Bush rested, or might have rested, as to the statutory mort-

gage, and that it did not rest on the view of the contract's being merely voidable. Kavanaugh v. Thompson, 16 Ala. 817, is relied on to sustain the position that the sale was only voidable; but it fails to the point, and only shows that distributees may elect to hold the representative liable for the value of the property.

In Dean and Wife v. Rathbone, 15 Ala. 328, no question was made, because the note of a third person was taken, and hence it was not decided; nor is it important now to consider that question. Because the note and security of a third person may be taken, *non constat* that the sale is good without any note or payment. The possession may be delivered at the administrator's risk before the terms are complied with, and if they are afterwards complied with the sale may be perfected; but it does not follow that the sale is good, or only voidable, if never complied with. The record shows an order of sale by the court, but it does not show that it was "on the application of the administrator." The order must show everything to sustain the jurisdiction; not doing so, it was void, and the sale was without order of court in fact.—Clay's Digest 223 § 13; 3 Ala. 674; 6 Ala. 110.

At common law, a sale could pass no title without compliance with the terms. Without the statute, however, the vendor might waive the compliance, and deliver the property, and the sale would be good. The statute inhibits that assent, and it does accomplish that, or it is valueless. Being inhibited from making the waiver, it is not an act binding the estate, nor is it an act of administration; and if not, no title passed.

That the construction contended for is the true one, is apparent from the object and design of the legislature. It would be strange to say that a public sale must be made, but it could be done without order of court, and that the whole object of the statute, towit: the protection and security of the estate, might be defeated by dispensing with the last, the most important, requisition, reaping the fruits of the sale by securing the payment of the money.

Cochran v. Roundtree, 3 Strobh. Law R. 217, is relied on to prove that delivery perfects the sale. The case only decides that it does against a sheriff; and conceding the law of South Carolina to be as restrictive as our statute now under consider-

ation, which does not by any means appear, nor is it to be inferred, yet it is nothing but the doctrine of Pistol v. Street, 5 Porter 64. The plaintiff in execution could not re-levy, as is well said in that case, because he had one full levy, and defendant had lost his property by it. Of course he could not make another levy on it, or on any other property of the defendant's, but must look to the sheriff. The case, therefore, is without analogy; it depends on well settled principles applicable to levies and sheriff's sales.

Defendant below could not protect himself under the doctrine of a *bona fide* purchaser. The doctrine of sales in market overt has no existence in this country.—Ventress v. Smith, 10 Peters 173; Hull v. Clarke, 14 Sm. & M. 186; Weir v. Davis, 4 Ala. 442; Beasley v. Mitchell, 9 Ala. 780.

The statute of limitations does not run. The proposition is, that, if the sale was void, the title remained in Lawson, and the holding was adverse. The true proposition is, that the title remained in the estate. But, taking the proposition as stated, the deduction is wrong, for the title must not only be in some one *in esse*, but in some one capable of suing.—Murray v. East India Co., 5 Barn. & Adol. 66; Angell on Limitations 55, and cases cited in note 1; 6 Ala. 605; 2 Porter 171; 3 Stewart 172; 18 Ala. 828.

It is said the record does not show that Sanderson assented to the widow's receiving possession, and therefore he was not estopped, but could have sued; that the statute of limitations began to run, and continued. The bill of exceptions must be construed most strongly against the plaintiff in error. But, without this, it shows that the widow bid off the girl Martha, took her into possession, held her as her own, and had never been required by Sanderson to pay for her, or to give her note; nor has she ever paid for her. It must be supposed that the question of Sanderson's having parted with the possession was conceded, or that the question was properly referred to the jury, and not excepted to. Again; the facts set forth in the bill justified the court in even assuming the fact, and all the charges asked show that this fact was not disputed.

Again; the transaction between Sanderson and the widow was a fraud on the estate, and the statute could not run.—Powell v. Wragg & Stewart, 13 Ala. 161; Beach v. Catlin, 4

Day's R. 284. The crying off the property gave no title; an act of sale, begun by it, failed, and the transaction became a private sale; this was an act conceded to be inhibited by the statute, which estopped the administrator from suing, and thereby prevented the statute from running.

As to the slave Isaac, the possession was not adverse.—Angell on Limitations 402 § 5, 329 § 27, 327 § § 8, 9; Ward v. Ruder, 2 Har. & McH. 145; Strong v. Strong, 6 Ala. 347. Nor was that of Lay, on marriage, as has been before shown.—The evidence shows that Isaac was never held adversely by Lay or wife, and the charges asked concede it. By the terms of the contract, it could not become adverse until the children were grown, and the proof shows that Sanderson was then dead, and there was no representative until shortly before suit.—Clark v. Hardiman, 2 Leigh 347; Boatwright v. Meiggs, 4 Munf. 145. By the contract, the bailment terminated when the children were raised, and hire should have been recovered for Isaac from that time; the charge that plaintiff could only recover his hire from suit brought, was error against us.

It is insisted that a demand of Isaac should have been made before suit brought. But the bailment had ended; the party should not have pleaded, and put plaintiff on proof of title, but should have disclaimed title, and offered to surrender the slave. This has been decided several times, even in trover; in detinue, no demand is ordinarily necessary.

It is also insisted that, in detinue, damages for the detention of the property are only recoverable from demand or suit brought; but this action is nothing but debt in the *detinet*, and the recovery of ddmages is for the unlawful detention, and must be damages for the time it was unlawful.—Glasscock v. Hayes, 4 Dana 58; Miles v. Allen, 6 Ired. 88. The authorities which hold general language seemingly adverse to this, use it in reference to particular facts, making it true in the case in hand, but having nothing to do with the general doctrine.

The foregoing propositions show that the demurrer was properly sustained to defendant's rejoinder. That the demurrer was properly sustained to the third plea, see Bell v. Pharr, 7 Ala. 813; Bettis v. Taylor, 8 Porter 564; White v. Ross, 5 S. & P. 123. The plea was not *puis darrein continuance*. Even could the plea have been allowed in any aspect, it could only be

to prevent a recovery of the slave, and to confine the recovery to her value; and this is all the judgment is entered for, though the authorities would have justified the usual entry for her.—In no aspect, therefore, was defendant injured by rejecting this plea.

The defendant below pleaded the statute of limitations specially, to which were good replications; no good rejoinder was put in. The plea, then, failed on an issue of law. Having been heard on an issue as to the statute of limitations, he was concluded as to it, and should not have been allowed again to raise it in the case, especially as the plea was replied to and avoided with facts to which he could not respond.

The replications having embraced the question of valid sale, &c., to which a response with facts was unsuccessfully attempted, defendant below should not have been again heard on the question of the validity of that sale. To allow it would be, to permit the party to speculate with a double chance on the same matter.

Detinue is an action *ex contractu*, and a count in debt may be added. In debt against a personal respensentative, you declare only in the *detinet*; yet the statute of limitations must be specially pleaded. This was once doubted, but is now settled.—1 Chitty's Pleadings 481, note 1. And there is no action *ex contractu* in which the statute of limitations can be given in evidence under the general issue.

The charge asked in reference to the hire of Isaac is double: first, that no hire could be recovered; secondly, at least only from suit. It was asked as an entire proposition, and the court was not bound to separate it, but might refuse it altogether.—Besides, the court had already laid down the law on the question too favorably for defendant.

GOLDTHWAITE, J.—As to the competency of Mrs. Lay: In McGuire v. Shelby, 20 Ala. 456, we held, that a distributee of an estate was *prima facie* an incompetent witness, when his testimony tended to increase the funds of the estate. In the present case, the witness was a distributee in both estates, the one represented by the plaintiff, and the other by the defendant; but the whole number of the distributees of the estate of Lawson were but four, while the distributees of the estate of Lay

exceeded that number. It follows that the distributive share of the witness in the property, if recovered by the plaintiff, would be larger than her share in the same property if it belonged to the estate of Lay. Upon these facts, therefore, she was an incompetent witness, and there was error in the ruling of the court, which admitted her as competent to testify.

It is said, however, that the facts disclosed by this witness upon her examination in chief, which are disclosed by the record, are sufficient to repel the presumption created by the facts stated on her examination on the *voir dire*. It is unnecessary to examine the testimony referred to, for this purpose; for, conceding for argument's sake, that the view taken by the counsel for the defendant in error is correct, as to the effect of this evidence, we all agree that it cannot be looked to to cure the error previously committed. Upon this point it is to be observed, that the issue before the court upon the *voir dire*, was simply as to the competency of the witness. That issue was decided, and another and a different issue presented to the jury. If the evidence given by the witness upon the last issue had been submitted to the court upon the first, it may be that the defendant could have shown, by her further examination, that she was interested, notwithstanding the facts proved by her; but matters which might thus have shown the existence of an interest on her part in favor of the plaintiff, although it would have been pertinent to the issue before the court, would not necessarily be connected with the issue before the jury, and in that case would have been irrelevant. The counsel had the right to stand upon his exception as taken, and could not be required to try the same question over in an issue framed for another purpose, and which, by the rules of law applicable to it, might not allow him to introduce the same evidence as upon the *voir dire*.

It also urged that the sale made by Sanderson, the first administrator of Lawson, was void, for the reason that no bond or other security was given by the purchaser. This question involves the construction of the first section of the act of 1809, (Clay's Dig. 223 § 13,) which is in these words: "It shall not be lawful for any executor, administrator or guardian, to take the estate, or any part thereof, at its appraised value, or to dispose of the same at private sale, except where the sale is directed by the will of the testator. But in all cases where it may

be necessary to sell the whole, or any part of the personal estate of any testator or intestate, it shall be the duty of the executor, administrator or guardian, to apply to the Orphans' Court of their county for an order of sale, and upon obtaining the same to advertise the time and place of such sale, in three or more public places in their county, at least thirty days previous to the day of sale, and then and there proceed to sell the same, at public sale, to the highest bidder, giving at least six months credit; the purchaser giving bond with approved security."—It has been settled by the repeated adjudications of this court, that a private sale of the property of the estate, made by the administrator, is void.—Weir v. Davis, 4 Ala. 444; Dearman v. Dearman, 4 Ala. 526; Fambro v. Gantt, 12 Ala. 398; Swink v. Snodgrass, 17 Ala. 653. The effect of the statute is, to declare this act unlawful, and it is upon this ground that the decisions referred to are based; but it does not necessarily follow, that the same consequences result from a failure on the part of the administrator to observe the other requisitions prescribed by the same section. The sale is not declared to be nugatory by the non-observance of such requisitions; and whether they are directory or mandatory, must, after all, depend upon the sound construction of each regulation, and of apparent legislative intention with regard to it.—Bank of United States v. Dandridge, 12 Wheat. 64.

We entertain no doubt that it was the object of the legislature, not only to prevent private sales of the property belonging to estates by the administrator, but any sale whatever, unless required by the condition of the estate, or the nature of the property proposed to be sold; and for that reason, it is essential to the validity of administrators' sales that the authority to sell should be derived from the court charged with the general direction and superintendence of the estate, and that it should be public; but we are not prepared to say that the provisions of the act which prescribe the notice, or relate to the security which is to be taken from the purchaser, stand upon the same grounds. On the contrary, we regard them rather as directions to the administrator, than as entering into the essence of the sale, and necessary to its validity. If, indeed, the last requisition was mandatory, it would seem that not only the particular description of security required must be given, but that it must be given by

the person specified in the act. The statute requires the bond of the *purchaser*, with approved security. The term "bond" is of definite and settled meaning; it is of higher sanctity and greater privilege than an instrument not under seal; and we know of no rule which would allow it to be dispensed with, if the requisition was other than directory. The same principle would apply to the term "purchaser." Yet we know that it is the general practice to secure the purchase by note with security; and in Dean v. Rathbone, 15 Ala. 328, we held that the administrator was discharged, by taking the bond of a third person with security; and this decision shows that the entire provision is not mandatory. In case of a private sale, or a sale without an order of court, the personal representative acts without authority; but the giving of notice, and taking security, are regulations prescribed for the exercise of his authority, applying only to the mode of doing the act, and should he fail to observe them, the sale may be avoided, or the bond of the administrator be resorted to, but the sale is not void.

Neither is there anything in the objection which is made to the order of sale by the Orphans' Court. It is true, that it does not appear upon the face of the order that it was granted upon the application of the administrator, but after the lapse of twenty years it may fairly be presumed that it was so made.—Gantt's Adm'r v. Phillips, at this term, and cases there cited.

It follows necessarily from these views, that the charge of the court as to the statute of limitations was erroneous. The evidence shows that the sale was made in 1828, and that upon the sale, Mrs. Lawson, the purchaser, acquired possession, and held the slave as her own property, until her marriage with the defendant's testator in 1832; and that from that time until his death in 1851, she was held and claimed by such testator. The first administrator, Sanderson, could have brought suit for the slave on the failure or refusal of the purchaser to give security, and the possession was therefore adverse, and upon the evidence as stated in the bill of exceptions would have warranted the charge, that a perfect title as to the slave Martha and her children was vested in the defendant's testator by the operation of the statute of limitations.—Howell v. Hair, 15 Ala. 164; Jones v. Jones, 18 Ala. 248.

As to the slave Isaac, there was no error in the charge of the

court prejudicial to the defendant. The evidence showed that he was held under a bailment made by the former administrator to Mrs. Lawson, and there was no evidence tending to show any adverse possession so far as he was concerned. The bailment, taken most favorably for the defendant, terminated when the objects for which it was made were accomplished, and it then devolved upon the party in possession, under the operation of the general rule in cases of this character, to return the slave if there was any person authorized to receive him.—Story on Bailments § 414; Benje v. Creagh, 21 Ala. 151. As to him, therefore, the plaintiff was entitled to recover damages by way of hire, from the taking out of letters of administration *de bonis non*.

The matters alleged in the third plea constiuted no defence to the action, and the demurrer to it was, therefore, correctly sustained.—White v. Ross, 5 S. & P. 123; Bettis v. Taylor, 8 Port. 564; Bell v. Pharr, 7 Ala. 813.

As to whether the adverse possession for six years could be given in evidence under the general issue in the present action, it is certain that possession of that character, and for that length of time, confers a perfect title on the possessor. The statute of limitations acts upon the title of personal property, and not only bars the remedy, but destroys the right. The possessor, having a complete title by adverse possession, could recover upon such title, if plaintiff; and that being the case, the same title may be proved by him when sued, under the general issue.—Smart v. Baugh, 3 J. J. Marsh. 308; Elam v. Bass, 4 Mun. 301.

As the points decided will probably be decisive of the case upon any future trial, it is unnecessary to consider the other questions presented.

The judgment is reversed, and the cause remanded.

CRUTCHFIELD'S HEIRS AND ADM'R *vs.* HUDSON.

1. Where a deed of trust, conveying both real and personal property, is found fraudulent and void because made to hinder and delay the grantor's creditors, in a claim suit under the statute between a judgment creditor of the grantor and a purchaser under the deed, the claimant is not concluded by that verdict and judgment, as to the *bona fides* of the deed, in a suit subsequently brought against him by a purchaser at sheriff's sale under the same judgment, to recover the lands conveyed by the deed, which defendant bought at the trustee's sale under the deed; and the record of the former suit is not admissible evidence against the defendant in the latter case.
2. A creditor who receives his *pro rata* share of the proceeds of sale under a deed of trust, is not thereby estopped from attacking the deed for fraud.
3. When the defendant in an action of ejectment dies, pending the suit, it should be revived in the names of his heirs at law and personal representatives.

ERROR to the Circuit Court of Talladega.

Tried before the Hon. ROBERT DOUGHERTY.

EJECTMENT by Samuel P. Hudson, the defendant in error, against Thomas Crutchfield, for certain lots situated in the town of Jacksonville in Benton County. The venue was changed, at the instance of the defendant, to Talladega.

The tenant in possession, upon whom the notice was served, was one John Ramey. Crutchfield appeared, and asked to be made a party as Ramey's landlord, and the tenant's name was dropped in the future progress of the suit. Crutchfield died before the trial, and the suit was revived against his heirs at law and administrator, the latter objecting to the revival of the suit against him.

On the trial, the plaintiff adduced evidence showing that the *locus in quo* was sold by the sheriff of Benton County, under an execution issued on a judgment of the Circuit Court of Benton, rendered on the 25th of October, 1839, for $2500, besides costs, in favor of Choice, Harbin & Co. against Aaron Haynes; that he became the purchaser at this sale, and received the sheriff's deed, which he produced; and that defendant, by his

tenant, was in possession of the lots. This sale took place in '46.

The defendants then proved that said Haynes, on the 15th of October, 1839, executed a deed of trust, conveying the *locus in quo*, with other real and personal property, to one M. M. Houston, as trustee, to secure the payment of certain debts due to Thomas Crutchfield and other creditors; that said Hudson was one of the creditors secured in the deed, his debt being a store account; that said deed was properly recorded, and that a sale was made by the trustee, pursuant to its provisions, of the land in controversy, at which sale Crutchfield became the purchaser, and received the trustee's deed; which was produced, dated February 1, 1841; and that Hudson received his *pro rata* share of the proceeds of this sale.

The plaintiff then proved that the note on which Choice, Harbin & Co. recovered judgment against Haynes, was made in August, 1837, and that the suit on it was commenced in February, 1839; that a *pluries fi. fa.* issued on this judgment in 1847, and was levied by the sheriff of Benton County on several articles of personal property embraced in said deed of trust from Haynes to Houston; that Crutchfield, the defendant in this suit, interposed a claim to the property under the statute; that a trial was had of this claim suit, between Choice, Harbin & Co. and Crutchfield, and that the property was found subject to plaintiffs' execution, and judgment was thereupon rendered condemning the property, and awarding costs against the claimant; that upon this trial, the plaintiffs in execution adduced evidence to show that said deed of trust was fraudulent and void, as having been made with intent to hinder, delay and defraud creditors, that the question of fraud *vel non* was distinctly made and submitted to the jury on that trial, and that the jury found the property subject to the plaintiffs' execution on the ground that said deed of trust was fraudulent and void, as having been made to hinder and delay the grantor's creditors; that the sale of said personal property was made at the same time the land in this suit was sold, viz., February 1, 1841; and that Hudson, the plaintiff in this suit, was not a witness on that trial.

The defendants objected to this proof relative to the claim suit, as being irrelevant; but the court admitted it, and defendants excepted.

Upon this evidence, the court charged the jury, that, if they believed the evidence, the verdict and judgment rendered in the claim suit between Choice, Harbin & Co. and Crutchfield, was conclusive evidence, in favor of Hudson, of the invalidity of the deed of trust from Haynes to Houston, as against the heirs and representatives of Thomos Crutchfield in this action; to which defendants excepted.

The several rulings of the court excepted to as aforesaid, and the charge given, are assigned for error.

John T. Morgan and G. C. Whatley, for plaintiffs in error:

1. The judgment in the suit between Choice, Harbin & Co. and Crutchfield was not evidence, for any purpose, in this suit, because the record of that judgment would not conclude Hudson, if offered in evidence against him. In such cases, there must be mutuality. It is a question of estoppel merely; and Hudson, not being concluded by that record, could not set it up as evidence in his favor. The record does not show that Hudson had any other connection with the case, than that he purchased under the Choice, Harbin & Co. judgment, under which they condemned the personal property.—Stephen's Nisi Prius 1663; McLelland v. Ridgeway, 12 Ala. 482.

2. Suppose Hudson had been offered as a witness for Choice, Harbin & Co., on the trial of the right of property. Would he have been incompetent, because he held the title to property which he had previously purchased under the same execution? If so, any other creditor of Haynes would have been incompetent, for he would have had an equal interest in setting aside the deed for fraud.

3. If the judgment of Choice, Harbin & Co. is conclusive in favor of Hudson, on the ground of privity, it must be conclusive for all purposes, and would exclude all denial of his title by Crutchfield. If the judgment is not conclusive of every question in the case, it can only be pleaded as an estoppel in the nature of an estoppel *in pais*, and is a part of the evidence to support the plea, thus destroying its own conclusive character.

4. There is no privity between Choice, Harbin & Co. and Hudson. It is not privity of estate, for the estate is different, and purchased at a different time and under different process,

but upon the same judgment. If Choice, Harbin & Co. had failed in their suit, for any cause, would Hudson have been estopped?—Allen's Heirs v. Hall's Heirs, 1 Marsh. Ky. R. 525. Hudson had his title before the trial of the case between Choice, Harbin & Co. and Crutchfield.

5. Hudson was one of the creditors provided for in the deed, which he now insists was fraudulent, and accepted his *pro rata* share of the proceeds of the very sale at which Crutchfield bought the lots now sued for. If he had knowledge of the fraud in the deed, and acted upon it, and was a party to the fraud, even by an act of ratification, he would be estopped from setting up his title against Crutchfield, who was the purchaser at the sale.

6. It was fraud *in the deed* which was insisted on in this case as an estoppel, for the verdict in the claim suit was based solely upon that idea; fraud *in the purchase* made by Crutchfield was not pretended. Crutchfield and Hudson were both parties to the deed, and both accepted its provisions. If it was fraudulent, so as to be set aside by the judgment of a court, both Hudson and Crutchfield must have participated in the fraud; and Hudson, having acquiesced in Crutchfield's purchase, and having taken his portion of the proceeds of the sale, would be himself estopped from setting up the fraud in the deed. This evidence was before the jury, without exception, in the court below, and the charge effectually excluded it from their consideration. The charge is, that, if the jury believe the evidence, the verdict and judgment in the claim suit was conclusive evidence of the validity of the deed, in favor of Hudson in this action, as against the heirs and representatives of Crutchfield.

7. The personal representatives of Crutchfield could not be joined with his heirs at law, as defendants in this action. The test is, whether the judgment against them would have been *de bonis propriis, aut intestatis.* If they had been sued jointly in the first instance, it would have been a misjoinder, and the case is not altered by the revival of the suit against them. The administrators of Crutchfield are not shown to have had possession of the land when the suit was revived. Ramey was tenant in possession when the suit was brought, and Crutchfield was admitted to defend as his landlord; and if Crutchfield thus undertook to pay the damages, in the place of his tenant, the admin-

istrators would not be bound by the undertaking in this form of action.—See 7 Ala. 459.

S. F. Rice, for the defendant in error :

1. In this suit, Hudson, as a purchaser of the land at sheriff's sale, must be regarded in two distinct points of view, and as clothed with two distinct classes of rights and immunities ; I. As a purchaser from the time he became such, and entitled to all the rights and immunities pertaining to him as such purchaser. II. As standing in the situation of Choice, Harbin & Co., the judgment creditors, and entitled to all the rights and immunities to which they would be entitled, if they had been the purchasers of the land, instead of Hudson, and the plaintiffs in this action of ejectment, instead of Hudson.—Avent v. Read, 2 Stewart's Rep. 488 ; Daniel v. Sorrells, 9 Ala. Rep. 436.

2. Hudson must be regarded as a privy of Choice, Harbin & Co., so far as beneficial to him ; and the heirs and representatives of Thomas Crutchfield, deceased, who was the defendant in this action, are clearly concluded by any thing which would have concluded him, if he had not died during the pendency of this suit. In other words, it is the right of Hudson to demand of every court to give him, in this suit, the benefit of every matter which could have been given to Choice, Harbin & Co., if they, instead of Hudson, had been the purchasers of the land under their judgment, and thereupon had brought this action against Crutchfield.—Wood v. Jackson, 8 Wend Rep. 36.

3. The verdict and judgment rendered on the trial of the right of property against said Crutchfield, claimant, having turned upon the ground that the jury believed the deed of trust fraudulent, which in that case was relied on by said Crutchfield, the claimant, and which in that case was assailed for fraud by said Choice, Harbin & Co., the plaintiffs in execution, must in this suit be regarded as conclusive evidence of the invalidity of said deed of trust.—Gardner v. Buckbee, 3 Cowen's Rep. 120 ; Strutt v. Bovington, 5 Esp. Rep. 58 ; Burt v. Sternberg, 4 *ib.* 559 ; Adams v. Barnes, 17 Mass. Rep. 365 ; Rakes v. Pope, 7 Ala. Rep. 161 ; McCrary v. Remson, 19 Ala. Rep. 431 ; Saint v. Ledyard, 14 Ala. Rep. 244 ; Betts v. Starr, 5 Conn. Rep. 550 ; Landreth v. Landreth, 12 Ala. Rep. 640 ; Davis

v. Davis, 10 Ala. Rep. 299; 3 Phillips on Ev. 827, 828, 960, 961.

4. On the death of said Crutchfield, the defendant, it was proper to revive the action against his heirs and representatives, especially under our statutes, which authorize the representatives to rent out the lands of the intestate, and by necessary implication confer upon him the right to the possession, in order that he may rent it and deliver possession to the person renting it. The administrator is the proper party to pay the damages.—Abercrombie *et al.* v. Jordan, 15 Ala. Rep. 580; Rowland v. Ladiga, 21 Ala. Rep. 9.

5. But, even if there was error or irregularity in this, or in entering the final judgment, this is no ground for reversal in this court:—The administrator alone objected to the revival—he did not pretend that he did not have possession of the property in controversy, either by him or his tenant. And after he excepted, he, as well as the heirs at law, "proceeded to a trial of the cause, and to make up the issue to try the titles to the lots of land and premises described in the declaration." The administrator and heirs having thus made up the issue, and having had a fair trial by jury, how can either of them be heard to complain of injury? What more were they or any of them entitled to? If there was error, it was in allowing them and each of them rather more than, perhaps, they were entitled to. By the course they took, they waived their right to object here; and even if they can object here, it is mere error without injury. In ejectment, there is no special pleading. The issue is as to the titles; and there would seem to be no sort of objection to allowing administrator and heirs to defend in such case.—Jackson v. Wood, 8 Wend. R. 9.

6. But, as all the parties are before the court, and as the title and damages have been settled by a verdict, rendered on an issue made up by all the parties, and tried by a jury selected by all the parties, it is clear this court will not reverse upon the objection of the administrator or heirs that no judgment should have been rendered against the administrator. If there is any irregularity in this, the Supreme Court will amend the judgment, at the cost of the plaintiffs in error.—Loomis v. Allen, 7 Ala. Rep. 706.

7. Ejectment, in this State, performs the double office of

ejectment and the action of trespass for mesne profits.—1 Chitty's Pl. 193, 194. And if the administrator could, in the action of trespass for mesne profits, be made liable for the damages, how is he injured by having that liability enforced in the present suit? He is actually benefited, because he is here relieved from the costs, the heirs being liable for the costs. He is complaining here of a benefit.—Alford v. Samuel, 8 Ala. Rep. 95; 1 Chitty's Pl. 193.

8. The fact that Hudson was a beneficiary in the deed of trust, and received a *pro rata* share under it, cannot affect the result of this case: I. Because Choice, Harbin & Co. would not have been affected by that fact, if they had been the purchasers under their judgment, instead of Hudson, and therefore Hudson cannot be affected by it. II. That fact, at most, would only amount to an estoppel *in pais*, and such estoppel cannot be made available in an action of ejectment, in a court of law.—McPherson v. Walters, 16 Ala. R. 714. III. No question as to that fact, or its effect, is presented by the record, or subject to revision in this court. The charge of the court does not raise the question, nor does the objection to the evidence in a mass raise it.

9. When a deed of trust embraces real and personal property, if it is void as to the personal property, for the fraud of the grantor and grantee, it is void as to the realty also, especially in a court of law.—Hunter & Thomas v. Tatum, 14 Ala. Rep. 557.

PHELAN, J.—The *bona fides* of the deed in trust from Haynes to Houston, as trustee, made to secure Crutchfield and others, and under which he and his representatives claim in this action of ejectment, was directly put in issue in the trial of the right of property, which previously took place between Crutchfield, as claimant, and Choice, Harbin & Co., as plaintiffs in execution, who levied on certain slaves embraced in the same deed in trust, as the property of Haynes, their debtor. The deed was prior in point of date to their judgment against Haynes, but they levied on the slaves, notwithstanding, alleging that the deed was fraudulent, as having been made "with intent to hinder, delay and defraud creditors." Crutchfield and Choice, Harbin & Co. came to trial on this issue, and it was

found in favor of the latter, and the slaves were condemned to the satisfaction of their judgment. As between these parties, then, the question as to the *bona fides* of this deed in trust is *res adjudicata*, and the decision has been that it is void for fraud.

Afterwards Hudson, who purchased at the same sheriff's sale under the Choice, Harbin & Co. judgment a house and lot in Jacksonville, which was embraced in this same deed in trust, and which Crutchfield had bought at the trustee's sale previously, brought this action of ejectment, to recover the premises of Crutchfield.

The main question now presented for our decision is this: Is Crutchfield, in this action with Hudson about the land, concluded as to the *bona fides* of the deed in trust under which he claims, by the verdict and judgment rendered in the suit with Choice, Harbin & Co. about the slaves?

This must wholly depend upon the answer to another question: Was Hudson a party to that suit, or a privy to those who were parties? for no principle can be better settled than that no man shall be concluded by a trial and judgment to which he was not either a party or a privy; in which he had not the opportunity, either in person or by proxy, to prosecute or defend his rights.—McClelland v. Ridgeway, 12 Ala. 482.

It is plain he was not a party. Was he a privy to those who were opposing parties to Crutchfield, namely, Choice, Harbin & Co?

To be a privy to another, a man must claim by or under that other, by blood, as heir, by representation, as executor, or by contract, as vendee, assignee, and the like; and a privy must come after him to whom he is privy, and never precedes.—2 Thomas' Coke 506

In respect then to the title to this house and lot, do we find that Hudson comes after Choice, Harbin & Co., and claiming under them, either by blood, representation or contract?

It is argued that he does; that he purchased the premises at a sheriff's sale under their judgment. But this is not a purchase from them. Hudson is not the vendee of the judgment creditor, but of the judgment debtor. The sheriff, by his deed, conveys to the purchaser all the right and title of the defendant to the judgment—of Haynes, and not of Choice, Harbin &

Co. If sued for the land, in privity with whom would he defend? With Haynes, of course. Haynes' title would be his title by his purchase at the sheriff's sale.

But does he not succeed to all the rights of the judgment creditor existing at the rendition of the judgment? and if the judgment of Choice, Harbin & Co. then rightfully bound the land notwithstanding the deed in trust, would not the purchaser, solely by virtue of that, hold it in spite of the deed in trust?—That is undoubtedly so, but it amounts to nothing towards establishing the proposition, that the purchaser would hold the land as privy of Choice, Harbin & Co., the judgment creditors. The right of the judgment creditors to have the land sold for the satisfaction of their judgment, exists in full force, because, as it is alleged, the deed in trust, though prior in point of date, is void for fraud, as against them. But what is it that is sold? what is it that the purchaser gets? The land of Haynes, with the title of Haynes, simply, and he is of course the privy of Haynes, as to that, and not of Choice, Harbin & Co., to whom the money goes. If Choice, Harbin & Co. had purchased the slaves at a sale under their own execution, and Crutchfield had brought detinue, instead of making it a claim suit, on the occasion of the levy, and the former had defended on the ground that the deed in trust was fraudulent, the identical question as to the *bona fides* of the deed would have been adjudicated in that suit, that was in the claim suit. But how would Choice, Harbin & Co. have defended in such suit? under whose title would they have rested? in other words, whose privies were they, in respect to the title to these slaves? Undoubtedly under the title of Haynes, and as the privies of Haynes. If the case had been so, that is, if Choice, Harbin & Co. had purchased under their own execution, then they would have stood in the very predicament in respect to Crutchfield in the detinue suit, that Hudson occupies towards Crutchfield in this ejectment:—both purchasers under the Choice, Harbin & Co. judgment, and both assailing the deed in trust on the ground of fraud.—But it has been clearly shown, that, in that suit, Choice, Harbin & Co. were the privies of Haynes, and how then can it be insisted that in this suit Hudson is the privy of Choice, Harbin & Co? The proposition exposes its own fallacy. If Choice, Harbin & Co. were the privies of Haynes in defending the title

to the slaves they purchased, then must Hudson be the privy of Haynes also, in deducing title to the land which he purchased. In respect to each and both the title is good, if the deed in trust was void for fraud; but they do not occupy such a relation to each other that a judicial decision of that question in favor of one, can be invoked by the other; because, as shown, they are not privies.

Try it by what the law considers a good test. A judicial decision binds both the parties and their privies, *sit finis litium*; both are forever concluded by it. Therefore, where A claims that B is estopped, concluded, by a judicial decision, the first question that arises is, had the decision been adverse to B, would he have been estopped, concluded, by it? for an estoppel, to be really and truly so, must be mutual, must bind both. If B would have been concluded, then A is so; if not, then A is not, and the question as to A and B is not *res adjudicata*.

"It is a general rule, that a verdict shall not be used as evidence against a man, where the opposite verdict would not have been evidence for him; in other words, the benefit to be derived from the verdict must be *mutual*."—1 Starkie's Ev. 196.

"Where the parties are not the same, one who would not have been prejudiced by the verdict, cannot afterwards make use of it, for, as between him and a party to such verdict, the matter is *res nova*, altho' his title turn upon the same point."—*Ib.* 197.

We do not think it can be insisted, that a verdict in favor of Crutchfield in the claim suit about the slaves with Choice, Harbin & Co., would have bound Hudson. He was no party; had no opportunity te be heard; and how then could his rights be affected? He was not bound; then neither is Crutchfield bound, as respects him.

That Hudson was not examined as a witness in the claim suit about the slaves, makes no difference. This is not the kind of case in which that circumstance is allowed to have any weight. Where a man gives evidence for the State in a criminal prosecution, and may thereby help to make the verdict turn a particular way, he will not be allowed afterwards to use that verdict, although otherwise he might, in a civil action.—Maybee v. Avery, 18 Johns. 352.

This disposes of the question relating to the judgment in the Choice, Harbin & Co. suit, and its nature and effect.

The position assumed by plaintiffs in error, that Hudson could not assail the deed in trust for fraud, because he was one of the creditors secured by it, and had received a *pro rata* share of the proceeds of the sale of the property conveyed by it, we do not consider tenable. It seems he was secured to some small amount, and received his *pro rata* share. That circumstance may have been proper to go to the jury for what it was worth, on the question of the *bona fides* of that deed, but the act of receiving his *pro rata* share worked no estoppel upon Hudson. The only sort of act that could estop him as to the *bona fides* of that deed, must have been one which induced the party with whom he was contending to place reliance on the deed as a good security, when it was not, by confiding in his acts or declarations. Nothing of this sort can be pretended, as between Hudson and Crutchfield, in relation to this deed. As to estoppels *in pais*, see Pickard v. Lears, 33 Con. Eng. C. L. R. 115.

We come then to the conclusion, that the court below erred in admitting the record of the verdict and judgment in the case of Crutchfield v. Choice, Harbin & Co., and proof that the question of *fraud vel non* as to the deed of trust was submitted and decided in that action; and also in the instruction that was given as to the effect of that judgment. The testimony should have been excluded for irrelevancy, and that, of course, would have left no room for instructions as to its effect.

The question raised in this case, as to the proper course to be taken in the revival of ejectments suits, where the defendant dies pending the action, was fully considered and settled at the last term of this court, in the case of Swan v. Driver's Heirs. See p. 192. It was there decided to be proper, under our system, to revive both against the heirs and personal representative, as was done in this case, so that the plaintiff, if he recovers, may take his judgment against the heirs for the land, and against the executor or administrator for the damages assessed as mesne profits and the costs.

For the errors aforesaid the judgment below is reversed, and the cause remanded.

BYRNE, ADM'R, *vs.* McDOW.

1. In an action at law in the United States courts, a plea by an administrator setting up a decree of a State court by which the estate of his intestate was declared insolvent, is no bar to the rendition of judgment; but, when the estate is actually insolvent, the judgment at law will be enjoined in equity, and the creditor be compelled to come in and take his place with the other creditors of the estate
2. But a decree of insolvency by a State court does not preclude a creditor, even in the United States courts of chancery, from denying the truth of the decree, and showing that the estate is solvent when its assets are fairly stated.
3. By the law of this State in 1840, a decree of insolvency might be obtained when the personal property alone was insufficient to pay all the debts, though the real estate might be more than sufficient for that purpose; but such a decree would not be conclusive evidence of the fact of insolvency in the United States chancery courts.
4. Where a judgment is rendered against an administrator in a Federal court, notwithstanding a plea of the insolvency of his intestate's estate, and execution thereon being returned no property found, the creditor institutes an action of debt on the judgment suggesting a *devastavit*, to enjoin which the administrator files a bill in equity, if the prooof shows that the estate is really solvent, the bill will be dismissed, and the creditor allowed to pursue his remedy.

APPEAL from the Chancery Court of Mobile.
Heard before the Hon. J. W. LESESNE.

THE bill was filed by William L. McDow, the appellee, to enjoin a certain action at law instituted against him by the appellant, William Byrne, as administrator of Josiah Thomas, deceased. The case made by the bill is this:

One Jacob Alford, as principal, and one Achilles Edwards, surety, made their joint note to one Josiah Thomas, for the sum of $2875, payable on the 1st day of January, A. D. 1836.—The said makers of the note were then residents of Greene County, and the said Thomas a resident of the State of Virginia. The said Thomas brought suit on the note on the 12th of July, 1838, in the United States Court for the Southern District of Alabama, against the said Alford and the said Edwards, but the process was served only on the said Edwards;

the suit was discontinued as against Alford, and thenceforward prosecuted against the said Edwards alone.

Whilst the suit was pending against the said Edwards, and before judgment was rendered, he departed this life, leaving a will, and naming therein one Tasker his executor. Tasker proved the will, and entered upon the administration, but acted as such but for a short time, and the complainant was appointed administrator with the will annexed, and was regularly made a party to the above mentioned suit pending in the United States Court as aforesaid. At the December term of said court, 1846, a verdict and judgment were rendered in said cause in favor of the plaintiff, for the sum of $4,945. On this judgment execution issued against the complainant, as administrator *de bonis non* as aforesaid, and was returned *no property found*. Edwards died in Greene County, where he had resided, about the first of January, 1839, and the complainant was appointed administrator *de bonis non* on the 18th November, 1839, (the said Tasker having in the mean time also died prior to that date.)

The bill states that the estate of Edwards was insolvent; that complainant so reported it to the County Court of Greene, and that court, out of which the complainant's letters of administration had issued, so declared it on the 29th of June, 1840. This decree of insolvency was made before the complainant was made a party to the action at law above mentioned; and the complainant pleaded this in bar of the recovery sought to be had against him in the said suit; but the plea was demurred to, the demurrer sustained, and judgment rendered against the complainant.

The bill further shows that one William Byrne, administrator of the said Thomas, who has also departed this life, has commenced, and is now prosecuting, in the Circuit Court of Mobile County, an action of debt against the complainant, founded on said judgment in the Circuit Court of the United States and the return of the execution issued on said judgment as aforesaid, and is seeking to make the complainant individually responsible for said debt, as for a *devastavit* of the assets of said estate.

The bill prays that this suit be perpetually enjoined, and that the creditor be compelled to come in with the other creditors in the Probate Court of Greene County, and be limited to his *pro*

rata share of the assets of said estate on a fair and just division of the same amongst the said creditors.

On the filing of this bill an injunction was granted, restraining the further prosecution of the action at law, and Byrne, the administrator of Thomas and plaintiff in the action at law, so enjoined, files his answer.

The answer admits all the allegations of the bill relative to the judgment obtained in the Circuit Court of the United States, and admits that the complainant, amongst other pleas, pleaded the insolvency of the estate of Edwards, and offered to support it by the decree of the County Court of Greene; that said plea was demurred to, and the demurrer sustained.

The answer denies that the estate is in fact insolvent, but alleges the contrary to be the fact; that after the sale of the lands belonging to the estate, there was a fund created which, with the personal assets of said estate, was more than sufficient to pay all of the debts; that the proceeds arising from the sales of land alone were upwards of $9000, whilst the claims presented for payment, exclusive of the debt of the respondent, were only $8,879 16.

The answer also admits the institution of the suit in the Circuit Court of Mobile County against the complainant, with a view to make him liable individually for his debt, as for a *devastavit* of said estate; further admits that the note which was the original cause of action, was given by the said Alford and said Edwards to said Thomas on account of a debt of the said Alford, but alleges that, at the time the said note was executed, the said Edwards took from said Alford indemnity, on which the said complainant had realized a part at least, if not the whole, of his debt, and had thereby become a trustee for the respondent for the payment of the money; and therefore the debt of the respondent could, in no manner whatever, be affected by the fact that the estate of the said Edwards was insolvent.

The answer further alleges that the complainant has interposed every obstacle in his power to the collection of this debt, has made no showing as to what assets he actually has in hand, and offered to pay nothing; and therefore, in consequence of such conduct, he is not entitled to any equitable relief in this court; that he conceals the actual state of the affairs of the estate, and has the funds belonging to the creditors in his hands, and there re-

tains them with the design of defrauding the creditors and particularly this respondent; that complainant has made no showing of the fund in his hands as collateral security for this debt, but conceals the same; and charges that complainant has misapplied the fund, or retained it in his hands, refusing to appropriate it to the payment of the debt which it was provided to pay, and shielding himself all the while by a plea of insolvency, which is not true in fact, but is predicated upon a declaration of insolvency made upon a showing of the personal assets alone, without taking into account the real estate of the decedent, and which, when taken in, renders the estate entirely solvent.

The complainant offers the depositions of divers persons, who prove the insolvency and worthless character of many of the persons named in the inventory of notes and accounts due to the estate.

There is offered also a transcript of the record and proceedings from the Orphans' Court of Greene County, and by that transcript the following facts appear:

By the first inventory rendered by the complainant there appears in his hands, in the shape of notes and accounts, the sum of $9925 87. Many of these claims, however, are marked doubtful. It also appears that there was in his hands personal property, other than notes and accounts, which was appraised at and which sold for the sum of $2,921 75.

The debts of the estate at the same time are shown to be $13,707 46, in which is included the debt of the defendant.—The estate is declared insolvent by the court, and an order made to sell the real estate of the decedent for the purpose of paying debts. The commissioners appointed to sell make return of their proceedings, by which it appears that they sold real estate enough to amount to the sum of $9,334 45. The record also shows that on a certain judgment in favor of the estate and against Abraham Alford, for the sum of $4,455 29, an execution was levied upon some fifteen negroes, which were claimed by one Peppin; but what was the result of the claim suit, does not appear. On the same judgment, on another execution, there seem to have been sold lands of the defendant Alford, as follows: one tract for the sum of $552; another tract for $15 63; another tract for $82; one other tract for $400; amounting in all to the sum ef $1049 63, leaving still some lands unsold for

want of bidders. These were subsequently sold for $19 70; and afterwards another slave was levied upon as the property of Alford, and claimed by one Coleman, and bond given to try the right; but it nowhere appears in this record, what the result of this claim was.

On the final hearing, the Chancellor rendered a decree perpetually enjoining the defendant from the further prosecution of his action at law against the complainant, leaving him at liberty, however, to take his place among the other creditors of Edwards in the Orphans' Court of Greene County; and this decree is here assigned for error.

Geo. N. Stewart, for appellant.

Wm. G. Jones, *contra*:

1. It cannot be denied that the legislature of Alabama had full power to prescribe the manner in which the estates of decedents in Alabama shall be disposed of, and, in case of insolvency, that the creditors shall share in it equally and ratably. This was done by our acts of the legislature on that subject. It is certain that it never was designed to give a foreign creditor an advantage over a resident creditor—to prefer foreigners to our own citizens. There must be some remedy to prevent such gross injustice as that would be. Nor was it ever designed to let a foreign creditor compel an administrator to pay, out of his own pocket, a claim against an insolvent estate. If this bill cannot be maintained, one of these monstrous consequences would result. If litigation were carried on only in the State courts, no such consequence could ensue; for, to any suit in such courts, the administrator could plead the insolvency of the estate, and thus, by the statute, each creditor would be compelled to submit his claim, along with the others, to the Orphans' Court, where all would share equally.

2. But a difficulty arises from a conflict of jurisdiction, where a foreign creditor sues, as in this case, in the United States courts. The constitution of the United States secures to a citizen of another State the privilege of suing a citizen of this State in the Federal courts, and he has a constitutional right to have his case tried there. But a plea of insolvency, according to our statute as it then stood, ousted the court in which it was

filed of jurisdiction of the case, and transferred it to the Orphan's Court, a State tribunal. Hence the Supreme Court of the United States decided, (and no doubt properly,) in the case of Suydam *et al.* v. Broadnax, 14 Peters 67, that such a plea was not good in the United States court. The consequence was, that, notwithstanding the State laws, the foreign creditor would get a judgment in that court for the whole amount of his claim, which might sweep the whole estate, and leave the home creditors nothing. This injustice obviously could not be tolerated.—There must certainly be some mode of preventing it. Accordingly, if the creditor proceeded on his judgment in the United States court to collect the whole in that court, or to make the administrator personally liable, that court would stop him by injunction from collecting more than his ratable share; and this was expressly decided in Williams v. Benedict, 8 Howard's R. 107.

3. If the administrator of Thomas had sued on his judgment in the United States court, we could have stopped him in that court by injunction. But having gotten his judgment in that court, and execution thereon *de bonis testatoris*, and a return of *nulla bona*, he sued McDow on his judgment, as for a *devastavit*, in the Circuit Court of Mobile County. This court has decided that such a judgment and return was conclusive evidence of a *devastavit*, as against McDow, (Garrow v. Emanuel, 3 Stewart 285; Thompson v. Searcy, 6 Porter 393;) and subjected him to a judgment *de bonis propriis* for the whole amount. The monstrous fraud and injustice of this is obvious; and there was no remedy at law. It was clearly a case for the interposition of equity.—Williams v. Benedict, 8 How. R. 107. And the decree of the Chancellor was perfectly correct: it does not deprive the creditor of any right. He had no right to anything but a *pro rata* share of Edwards' estate, and that right the decree gives him liberty to assert in the proper forum.

4. The record does not show that the sale of lands made the estate solvent; directly the contrary is shown: it was and is insolvent.

GIBBONS, J.—It seems to be the settled doctrine of the United States courts, in actions at law on contracts, to disregard pleas of the insolvency of the estate against which the

actions are pending. Such pleas, when founded upon decrees of courts of probate, or courts of ordinary of the several States, constitute no defence against the recovery of a judgment on the debt in suit.—Suydam *et al.* v. Broadnax *et al.*, 14 Peters 67. But, whilst this is true of the United States courts of law, it is otherwise in their courts of equity, and a judgment rendered against such an estate, notwithstanding the interposition of a plea of insolvency, will be enjoined at the instance of the representative, and the judgment creditor be compelled to take his place with the other creditors of the estate.—Williams v. Benedict *et al.*, 8 Howard 107. Were it otherwise, the foreign creditor would have a decided advantage over the creditor at home, and the estate of an insolvent, instead of being distributed qually amongst all of the creditors, would be appropriated in many cases exclusively to the payment of a single creditor abroad to the exclusion of all others at home.

We say nothing of the policy of the decisions of that court, nor would we attempt to defend the expediency of having one rule in courts of law in respect to insolvent estates, and another in equity. As the remedy of the creditor in those courts, for the collection of the debt sought to be recovered, must eventually depend upon the fact whether the estate is solvent or insolvent, we can see no good reason why that question could not as well, (if not with much more propriety,) be tried by a jury in a court of law, as to be tried by a court of chancery. We think it clear that, even in a United States chancery court, the mere fact that an estate had been decreed to be insolvent by a State court, would not preclude the creditor from denying the truth of such decree, or from showing that notwithstanding such decree the estate was entirely solvent, when all its assets are fairly stated. It is in cases of actual insolvency that the United States chancery courts entertain bills to enjoin judgments at law; but, if such insolvency is apparent only, and not actual, we cannot suppose that these courts would permit themselves to be divested of jurisdiction, and their suitors sent to another, and a State forum, to seek their remedies.

It is unnecessary that we should decide whether or not the chancery court could look behind the decree of insolvency rendered by the State court, on any matter existing anterior to the decree, except actual fraud in its procurement. We deem it en-

tirely clear that, if, by events occurring subsequent to the rendition of the decree of insolvency, the estate has become able to pay its debts, a court of chancery would not be precluded by the decree merely from such investigation.

It is by applying an analogous rule to the case before us that we arrive at our conclusions.

The law, as it stood in Alabama in 1840, when the estate of Edwards was declared insolvent, would enable the personal representative to obtain a decree of insolvency on an estate worth much more than it owed. All that the executor or administrator had to do was, to show to the court that the personal property of the estate was not sufficient to pay the debts, and a decree of insolvency was rendered almost as a matter of course, although the real estate of the decedent might have been sufficient to render the estate not only solvent but rich. In such cases, to allow the decree of the State court to divest the United States chancery court of its jurisdiction, would be unreasonable, and the party setting up the insolvency of the estate in that court could not rely upon the decree of the State court, rendered under such circumstances, as conclusive evidence of the fact of insolvency. If that decree was inconsistent with the actual fact, the creditor would, in our opinion, have the right to make it appear; and if it was shown that the estate was in fact solvent, notwithstanding the decree in the State court, the creditor would not be driven to a State forum to prosecute his claim, but the bill seeking to enjoin the judgment at law would be dismissed.

In the case at bar, if the estate of Edwards is in fact insolvent, as it is alleged to be in the bill, and as it was decreed to be in the Orphans' Court of Greene County, then it would be obviously unjust and inequitable to allow the respondent to proceed in his action at law against the complainant, and thereby subject him individually to a liability for the debt; but on the other hand, if such insolvency does not in fact exist, notwithstanding the decree of the Orphans' Court of Greene County, then we see no reason why the respondent should be deprived of the remedy which he has adopted for the recovery of his debt.

In the application of the complainant to have the estate of Edwards declared insolvent, and for an order to sell the real

estate, he shows that the amount of notes, accounts and evidences of debt in his hands, was $9925 87, and that the proceeds of the sale of the personal property, other than notes &c., in his hands, amounted to the sum of $2921 75; making an aggregate of personal assets of $12,857 62. Of the first item, made up with notes, accounts &c., many of them are represented as doubtful. As a part of the same showing, the debts owing by the estate are shown to be $13,707 46, thus showing the estate to be insolvent, as the law then stood, that is, the personal assets were not sufficient to pay the debts. Both parties, on the hearing before the Chancellor, seem to have relied upon, and offered in evidence a transcript of the record and proceedings of the Orphans' Court of Greene County; and by said transcript it appears, that an order was obtained for the sale of the lands of said decedent, commissioners appointed to make said sale, and their report of their action as such commissioners. They report that they have sold lands amounting to the sum of $9334 45, and have turned the proceeds over to the administrator. It is further shown by proof that, on one judgment belonging to the estate against one Alford, the complainant received in cash, from the sale of lands levied on under execution, upwards of $1000. That judgment was for the sum of $4455 29; and besides the lands sold, there were levied upon, as the property of said Alford, some fifteen or sixteen slaves, which were claimed by third persons, and bond given for the trial of the right of property. Whether any cash has been realized from these trials of the right of property the record does not disclose, nor does it appear what, if any thing, has ever been collected from the other notes or accounts belonging to the estate.

Here, then, we see an aggregate of cash amounting to upwards of $13,256 20 has gone into the hands of the administrator, with which to pay a debt $13,707 46, leaving entirely unaccounted for the balance of the notes and accounts amounting to upwards of $5000, and also the claim suits for the negroes on the large judgment against Alford. We think it fair to presume, that the complainant has or ought to have collected something on the notes and accounts other than that of the judgment against Alford; and in his silence upon the subject, when he alone is the most capable of rendering, and is in duty bound to

render the information, we think it but reasonable to presume that he has collected enough at least to render the estate solvent, and to pay off all its debts.

When the complainant's bill is examined with reference to the proof in the cause, there is, we apprehend, some cause for the allegation in the defendant's answer, that the complainant has sought by every means in his power to mystify and conceal the facts in relation to the estate of the said Edwards; for it must be confessed that, with the means of information in his hands in reference to the affairs of said estate, the bill gives but little light as to its true condition. Our conclusion is, from the proof in the cause, that the estate of Edwards is solvent, and has been so since the sale of the lands belonging to said estate; and the estate being solvent, the complainant has no right to call upon a court of equity for relief, but the defendant should be permitted to pursue the remedy that he has selected for the recovery of his debt.

It follows, therefore, that the Chancellor erred in his decree, and it is here reversed, the injunction ordered to be set aside, and the complainant's bill dismissed, with the costs of this court and of the court below.

LONG ET AL. *vs.* McDOUGALD'S ADM'R.

1. A deed from a Creek Indian reservee, under the treaty of March 24, 1832, after it has been approved by the President of the United States, conveys such title to the purchaser as will maintain an action of ejectment.
2. When a deed is made to two jointly, the law, in the absence of proof as to their respective interests, presumes that they are equally interested; and the transfer by one of them, by words *in præsenti*, of all his right, title and interest in the lands, conveys a moiety.
3. The administrator of an estate which has been declared insolvent has no right, under the statute, to bring ejectment for the recovery of lands belonging to the decedent.

ERROR to the Circuit Court of Russell.

Tried before the Hon. JNO. GILL SHORTER.

EJECTMENT by Jesse Wilkinson, as administrator of Daniel McDougald, deceased, against N. W. Long, the plaintiff in error, to recover an undivided moiety in section eight, township fifteen, range twenty seven, situated in the County of Russell. There was a verdict, and judgment thereon rendered, for the plaintiff below.

It appears from the bill of exceptions, that the said half-section of land was reserved to a Creek Indian, under the treaty of March 24, 1832; that the said reservee duly sold and conveyed the same to Fannin & Howell, on December 31, 1834; and that John D. Howell, in the name of Fannin & Howell, executed to McDougald the following instrument:

"For value received, I, John D. Howell, of Muscogee, and State of Georgia, do hereby assign, transfer and set over unto Daniel McDougald, of said county and State, all my right, title, claim and demand to a tract of land purchased by Fannin & Howell, designated as the north half of section number eight, in township number fifteen, of range number twenty seven, situate in the district of lands subject to sale at Montgomery, and request that a patent may be issued to said McDougald, his heirs or assigns. Witness my hand and seal, this first day of Feb'y, A. D. 1840."

(Signed) FANNIN & HOWELL,
by JOHN D. HOWELL, [L. S.]

It was also shown that said McDougald had departed this life, and that his estate had been duly declared insolvent before the commencement of this suit. This was the plaintiff's title.

The defendants claimed under a tax collector's sale, and deed made in pursuance thereof. It appears that the land was advertised to be sold on Tuesday after the first Monday in August, 1849, but on that day the sale was publicly postponed until the first Monday in September; the advertisements in the newspaper and at the court-house door, were changed accordingly, and the land was then sold, on said first Monday in September.

Lease, entry, ouster and possession having been admitted, the plaintiff asked the court to charge the jury, that, if they believed all the evidence, they must find for the plaintiff; which charge the court refused to give, and charged the jury, that, if they believed all the evidence, they must find an undivided half

of said land for the plaintiff; to which charge the defendants excepted. The defendants then asked the court to charge the jury, that, if they believed all the evidence, they must find for the defendants; which charge the court refused to give, and the defendants excepted.

The charge given, and the refusal to charge as asked, are now assigned for error.

WHITE & PARSONS, for plaintiffs in error:

The first question presented is, whether the administrator of an insolvent estate can recover in ejectment, on the evidence disclosed by the record. The act of 1843 (Clay's Digest 192 § 2,) does not change the previous law; and it is certain that, before its passage, the administrator had no right to bring an action of this kind: it could only be brought by the heirs at law, upon whom the legal title is cast by operation of law, on the death of their ancestor.—7 Ala. R. 459. The ninth section of the act shows what rights vest in the administrator. The first section of the act of 1839 empowers him to rent the lands; and the act of 1820 authorizes him to apply for leave to sell real estate.—Clay's Digest 196, 199. The rule laid down in this court seems to be, that both the administrator and the heirs are necessary parties.—Jordan v. Abercrombie, 15 Ala. 580; Swan v. Driver, at this term, opinion by Gibbons, J.

The statute of 1843 does not give the administrator the right, even though the estate be insolvent, to sue in his own name for the recovery of the land. This suit, therefore, cannot be sustained by him.

The approved deed to Fannin & Howell, and the transfer by Howell of his interest in the land to McDougald, are not sufficient evidence of title to sustain this action. The words of the transfer do not purport to convey a title, for it requests the Government of the United States to issue a patent to McDougald; and where it is evident that the vendor did not intend to convey title, it has been held that the instrument amounted only to a bond for titles, though it contained the words "grant, bargain and sell."—Chapman v. Glassell, 13 Ala. R. 50.—What more is this instrument than that?

The postponement of the sale by the tax collector, as shown by the record, does not vitiate his deed, nor render it void. The

owner of the land ought not to be permitted to recover it, without paying the purchaser his money and interest. These sales for the purpose of raising revenue ought not to be set aside, unless wholly void.

GEO. D. HOOPER and BELSER & RICE, *contra :*

1. Administrator may sue in ejectment, when the decedent might have done so.—Masterton v. Girard, 10 Ala. 60.

2. Approved contract conveys title, as against any one not claiming through the Indian.—Jones v. Inge *et al.*, 5 Por. 331; Treaty found in 5 Porter 414.

3. As to the sale by the tax collector, mode of advertising, deed, &c. see the tax laws of 1848 and 1849.

4. Tax laws construed strictly.—Scales v. Alvis, 12 Ala. 619; Lyon *et al.* v. Hunt *et al.*, 11 Ala. 310; Pope v. Headen, 5 Ala. 434.

5. Plaintiff may recover a moiety.—Sawyer v. Fitts, 4 S. & P. 365; 2 Porter 9.

CHILTON, C. J.—The questions made upon the record are:

1. Does the deed of conveyance from the Creek Indian reservee, after it has been approved by the President of the United States, convey such title to the purchaser as will warrant ejectment?

2. Does the written transfer in the name of Fannin & Howell, to McDougald, convey such legal estate in the land, or any portion of it, as entitles the purchaser to sue in this form of action?

3. Has the administrator of an insolvent estate, under our statutes, the right to maintain an action of ejectment, to recover the lands of the decedent?

1. The first point is covered by the decision of our predecessors, in the case of Roper v. Bradford, 9 Por. Rep. 354; and although we might be disposed to question the correctness of that decision, were the question an open one, we must adhere to it, as having settled a rule of property, a departure from which might seriously unsettle the titles to lands in the country.

2. Fannin & Howell having such legal title as would sustain an ejectment, they had full power to sell and dispose of the

same to any other person. In the absence of proof as to the interest which each of them had in the land, the deed being made to both, the law raises the presumption that they were equally interested.

A transfer by words *in præsenti*, by Howell to McDougald, of all his interest, right and title to the land, given under the hand and seal of said Howell, operates a good conveyance of whatever legal title he had to McDougald, and he having a moiety, that moiety vested thereby in McDougald. The fact that he requests, in the transfer, that the United States should issue a patent to McDougald, is nothing more than an order or request to vest him with the *evidence* of the title, which already resided in him by the conveyance.

This transfer is altogether unlike the case of Chapman v. Glassel, 13 Ala. 50, for, in that case, the instrument relied on as a conveyance, not only purported to be a mere obligation to make title *in futuro*, but the vendee, by a cotemporaneous instrument, expressly admitted that it was a bond, and that certain payments were to be made by him before he could demand a title. There is nothing of the kind in the case before us.

3. Upon the third point we have had more difficulty. Ordinarily, when a party dies owning lands, they descend to his heirs at law, and to hold that his personal representative could sue for and recover them, would appear somewhat anomalous. In Phillips v. Gray, 1 Ala. 226, this court was called upon, for the first time, to construe the act of 1839, authorizing the administrator to rent the lands of the decedent until the final settlement. It is there said, "There can be no doubt, that, in all cases coming within the purview of this act after its passage, the right of the heir to enter upon, and enjoy the real estate of his ancestor, is intercepted in favor of the personal representative of the deceased, until final settlement of the estate." In Masterson v. Gerard's Heirs, 10 Ala. 60, this court held, that the administrator had the right to recover rent upon the demise of his decedent, but that, until he asserted the power given him by statute, by notice to the tenant, or by actual suit, the heir might sue for and recover rent falling due after the death of the ancestor; thus qualifying the doctrine as asserted by the judge who delivered the opinion in Phillips v. Gray, *supra*.

The construction of the act of 1839 again came before this

court, in Haskins v. Pope, 20 Ala. 493, in which case it was held, that the administrator was, under its provisions, authorized to receive rent accruing after the death of the intestate, on a lease made in his life-time, as he, if living, could recover for use and occupation. In delivering this opinion, also, the judge says: "It cannot be supposed the legislature intended, as between a former tenant and the administrator, that the latter should either have no power to evict, or recover rent."—20 *ib* 498.

In Upchurch v. Nosworthy, 12 Ala. 532, the court held, that an administrator had no right to the proceeds of the crops made upon the lands of his intestate, with the slaves of the estate, previous to the grant of administration; and it was left as a *quere*, whether he could not recover the value of the use of the slaves and other personal property. In delivering the opinion, the judge says: "The title to the land descended to the heir at law, subject to the entry of the administrator, for the purpose of renting it."—15 Ala. 534.

In Jordan v. Abercrombie & Thompson, 15 Ala. 580, it was held, that where, in an action of trespass to try title and recover damages, the plaintiff in error, against whom, as defendant in the court below, there was a verdict and judgment for the land and damages, died, it was necessary to revive the suit in the names of his personal representative and heirs at law. It was said, as the title to the freehold was in controversy, it was clear that the heir was the proper representative of the decedent as respected the land, and the administrator as to the demand evidenced by the judgment.—15 Ala. 582.

In Martin's Ex'r v. Williams, 18 Ala. 190, we held, that the power conferred by the statute to rent land was a special power, and must be executed in the manner pointed out by the act; that to entitle the administrator to the rents, as assets of the estate, it was essential that the land should have been rented at public outcry, as prescribed by the statute.

So, in Chighizola v. LeBaron, executor &c., 21 Ala. 406, it was held, that the statutes of this State authorizing the executor or administrator to sell or rent the lands of the testator, &c., do not, of themselves, intercept the passing of the estate to the heirs or devisees, who may assert their title, with all its incidents, until the executor exerts the power reposed in him by the statute; that the power to rent was a bare authority con-

ferred by the statute, and must be strictly pursued, and if the lands are not leased, according to the requisitions of the statute, at "public outcry," it is not a due execution of the power, and cannot be regarded in any manner as affecting the rights of the heirs or devisees.

The rule, which we think may fairly be extracted from the foregoing decisions, is, that upon the death of the intestate, the lands belonging to him descend to his heirs at law, who hold the legal title, subject to certain powers conferred by the several statutes on the administrator, as the right to rent them at public outcry, if the estate be solvent, until the final settlement; and if it be insolvent, he is required, under pain of being guilty of a *devastavit*, to apply for leave to sell the lands to the Orphans' Court, within three months after the report of such insolvency.—Clay's Dig. 197 § 27. The administrator, as such, has no title whatever to the land, but only a power to rent, or, if so ordered by the probate court, a power of sale, which sale, when duly made, divests the title of the heirs, and vests whatever title the ancestor had in the purchaser.—Clay's Dig. 229 § 46. But the title of the heir is not divested until such sale and conveyance; nor is his right of entry intercepted, until proceedings are commenced by the administrator, to subject such real estate to the payment of the debts.

The administrator may recover the rent accruing either before or after the death of the intestate, upon the demise of the intestate, but he cannot bring an ejectment to recover possession of lands belonging to an insolvent estate. He has no power over such lands, save as conferred by statute, and this gives him no authority to possess them, but merely to obtain an order for their sale, and to sell them. If any one is in the adverse possession, this does not invalidate such sale, as the doctrine of adverse possession does not apply to judicial sales.—Whether the administrator might not unite with the heirs in maintaining an action to recover the possession, in order to rent out the land, is a question not presented; for, here, the estate is insolvent, and in such case the land is to be sold, not rented, and this sale does not pre-suppose the necessity of possession in the administrator. He is the mere conduit, through whom the title passes from the heirs at law to the purchaser.

It follows, therefore, that the administrator of McDougald has

no such title as will enable him to maintain ejectment, and that the charge of the court was consequently erroneous.

We need not examine as to the validity of the tax collector's deed, since its validity or invalidity would in no wise affect the result.

Let the judgment be reversed, and the cause remanded.

FULTON INS. CO. *vs.* MILNER, TINSLEY & CO.

1. An assignment of error which is not insisted on in the argument or brief of the appellant's counsel, must be considered as waived.
2. When it is shown or may be fairly presumed that the parties to a policy contracted in reference to a custom existing in the city where they did business, and where the policy was effected, the general law must give way to the custom.
3. To give validity to a custom regulating the assessment of damages in cases of partial loss on insured goods, it is not necessary that it should extend to the whole State; if the custom is generally known and acted on in the port, city or town where the policy is effected, it is sufficient.
4. The custom in the city of Mobile as to the mode of adjusting damages in cases of partial loss on valued policies, held valid and binding on parties residing and contracting in that city. This custom is, to pay the difference between the sales price of the injured article and the price stipulated in the policy.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. JOHN A. CUTHBERT.

ASSUMPSIT by Milner, Tinsley & Co. against the appellant on a valued or closed policy of insurance on seventy-eight boxes of manufactured tobacco, shipped from New York to Mobile on the brig Sarah Brown, sixty of which were injured on the voyage to an extent exceeding fifteen per cent., the minimum stipulated in the policy.

"There was evidence conducing to show that about six boxes were injured by the dangers of the sea, so as to affect the tobacco itself; while only the exterior of the boxes of

the remainder sought to be recovered for were stained by the sea, the tobacco itself being uninjured. The evidence also conduced to show, that the consignees only sold tobacco in boxes; that when a box of manufactured tobacco was stained, it had to be opened, in order to ascertain whether the tobacco itself was injured, as was done in this case; that the fact of opening the boxes materially injured the sale of the tobacco, and that in the sale of manufactured tobacco the box and tobacco were always sold together, and the condition of the tobacco could only be ascertained from the external condition of the box; that all the tobacco sought to be recovered for was sold at public auction by the consignees, and by reason of the condition of the boxes, and from the fact that the boxes had been opened, the tobacco in stained boxes sold at a loss of more than fifteen per cent.

"The court charged that, if the jury believed the stains on the boxes were caused by the dangers of the sea, on the voyage covered by the policy, and that thereby the tobacco was rendered less valuable by more than fifteen per cent., they must find for the plaintiffs on account thereof, although they should believe that the tobacco itself, without regard to the box, was uninjured; to which charge the defendant excepted.

"There was also evidence conducing to prove that the tobacco was insured at forty cents per pound, making the gross sum of $3120 inserted in the policy; but that the tobacco, free from all injury to box or tobacco itself, was, at the time of the sales made of the injured article, or at any time *of* its arrival in Mobile, worth less than the sum insured. The evidence as to its true value was, in substance, that, at the time the insurance was effected, it was worth in Mobile about thirty-five cents per pound, and about a cent less in New York; but that after its arrival, and at different times, boxes of the good, free from stains or other injuries, had been sold at public auction by the consignees, under favorable circumstances, in order to test its value, and that it brought about twenty-eight to thirty-one cents per pound. The question of the *bona fides* of the insured, in inserting forty cents per pound in the policy, was presented, and submitted to the jury by the court in a manner satisfactory to plaintiff and defendant.

"There was also evidence to prove that, by the custom of insurers and insured in Mobile, partial losses on closed policies

are adjusted by paying the difference between the sales price of the injured article and the price stipulated in the policy. On the part of the plaintiffs it was insisted, that this custom furnished the rule for adjusting the loss by the jury; while on the part of the defendant it was insisted, that the rule was to ascertain a per centum of loss by calculation based on the gross value of the uninjured article per pound and the gross value of the injured article per pound, and then apply the per cent. so found to the sum fixed in the policy. The court ruled, that, if the jury believed the custom in Mobile of adjusting closed policies was as stated, it governed, and that the loss should be assessed on the principle contended for by the plaintiff; to which defendant excepted."

The two charges of the court above set forth, to which exception was taken, are now assigned for error.

Chandler, Smith & Herndon, for appellant:

What is the rule for computing the amount to be paid by the insurance office? For the plaintiff in error it is insisted, that the rule is, to find a per centum of loss by calculation based on the true value of the uninjured and of the injured tobacco, and to apply this to the sum inserted in the policy. This rule is purely mathematical and must be true; it requires no citation of authorities. But it is also as well and definitely settled by authority.—1 Arnould on Insurance 970 to 974; 2 *ib.* 310, 312; Natchez Ins. Co. v. Buckner, 4 Howard's Miss. R. 63, the head note of which is erroneous.

The defendants in error, however, proved that, by the custom of Mobile insurance offices, such losses on such policies are adjusted by subtracting the sale price of the injured article from the value inserted in the policy, and they insist that the custom governs. But "an usage must be established, known, certain, uniform, reasonable and not contrary to law."—2 Green. Ev. § § 250, 251; 1 Sandford's S. C. R. 137; Anthon's R. 56; 7 Leigh 632; 5 Shep. 462; 5 Dana 501; 1 Green. Ev. 422 § 292; 2 *ib.* § 249; 10 Mass. 26, 29; 15 Mass. 431; 14 Mass. 106; 12 Pick. 107; 14 Pick. 141; 21 Pick. 483. "These usages should be sparingly adopted as rules of law, as they are often founded in mere mistake, or in the want of enlarged and comprehensive views of the full bearings of principles."—

2 Green. Ev. § 251. As to the true object of allowing a custom, see 2 Green. Ev. § 251; 5 Howard's Miss. R. 744.

The terms employed in this policy are clear; the risk covered does not embrace the rise or fall of the market, as the rule insisted on by defendants in error would make it; the principle of calculation is absolutely true, for it is mathematical; and "when the terms employed are clear and precise in themselves, no evidence of any usage or custom can be admitted to explain, to alter or impair them."—Arnould on Insurance 63. "If the clauses in the policy are clear and unambiguous, the courts cannot permit parol evidence to contradict, to vary or explain them."—*Ib.* 64.

By the rule invoked by defendants in error, can it be ascertained whether the loss is more or less than fifteen per cent?—Suppose the article sells for fifty per cent. less than the insured sum; *non constat* but that it did so by fall of market, or because of over insurance. Suppose the article to be damaged only five per cent., the insurers paying nothing unless the damage is fifteen per cent.; and the damaged article sells for twenty per cent. less than the insured sum; does the insurer pay, because a crude custom exists, founded in wrong and ignorance, of subtracting sales price from insured price? This would be to make the insurer pay for fall of market. Suppose the article insured for only fifty per cent. of its value; say, for instance, that it is worth $3000, and is insured for $1500, and that there is a damage of twenty-five per cent. It sells for $2250. Does the insured get nothing? Does he pay the insurer $750, instead of getting something? That is the consequence of the rule of substraction.

No subject more imperatively demands uniform rules, known, settled, clear and just rules, than the construction of policies. Their form is almost the same at Lloyd's and at the smallest office of the inland town. They have been allowed to retain their seemingly senseless jargon, because of these considerations, and because the meaning of the terms has been settled. Instead of looking to the decisions of Lord Mansfield, "whose judgments were not bottomed on narrow views, or, on this question, on the municipal regulations of England, but on those great principles of public justice and convenience which had been sanctioned and approved by universal experience;" whose

"deep and extensive learning was acquired by consulting the most intelligent merchants, and the works of distinguished foreign jurists, and by carefully studying the French ordinance of 1681," are the courts to grope about into every port where a ship may float, to see what rule ignorance has suffered to creep in, and abide until information and truth and right shall dispel it? If so, law ceases to be a rule of right, and the law of insurance—the prop and stay of commerce, a branch of national and public law—can no longer have invoked for it the language of Cicero: "*Non erit alia lex Romæ, alia Athenis, alia nunc, alia post-hac; sed et omnes gentes et omni tempore una lex et sempiterna et immortalis continebit, usque erit communis quasi magister, et imperator, et omnium deus.*"

If this custom is law, how long is it to continue? If courts make a wrong decision, they can change it, and parties have a right to show the error and insist on its correction; but is every crude custom to be set up, to control courts, and to hold despotic sway over right and law? Suppose that it changes tomorrow; is it then gone? If so, law is very unstable.

It may be said, that the parties might have stipulated for the rule insisted on by the defendants in error, and therefore upon the custom it is to be presumed they did. It is true they might have done so, as parties may stipulate for anything not contrary to public policy; but the question here is, what did they stipulate for, and this cannot be answered by going out of the contract, and establishing *aliunde* something variant from and contrary to it. It is the simple question of changing a written contract by parol proof. The policy says it covers certain losses, rise or fall of market not included, and custom is offered in evidence to show that it does cover rise and fall in the market.

The only other question in the case is, did the stains on the boxes, the tobacco being uninjured, amount to a damage covered by the policy? The policy insures against injury to the tobacco, and the evidence shows that the tobacco itself was not injured.

P. Hamilton, *contra:*

The first charge assigned for error was correct. Tobacco is well known to be peculiarly liable to injury; its mode of

packing, its nature, and the nature of its trade, are all well known to insurers, who are bound to know every thing appertaining to the trade about which they contract.—1 Arnould on Insurance 42, 66, *et seq.* Being so liable to injury, tobacco is placed in the memoranda attached to the policy. The insurers thus protect themselves from injury, and require the insured to become his own insurer to the extent of fifteen per cent. on the amount of his shipment. In this case, the loss exceeded that amount, and was shown to have been caused by the perils covered by the policy.

As to the mode of ascertaining the damage: The rule adopted by the court below was correct, being founded on the uniform custom in Mobile. The good faith of the insured, in fixing the valuation named in the policy, is not impeached. The policy is a valued or closed policy, in contra-distinction to an open policy.—1 Arnould 18. In fixing the valuation, it is competent for the assured to calculate the first cost of the goods and the premium of insurance, and to add a fair profit.—1 Arnould 300, 326; 13 East 327; Stevens & Benecke 1, 2. From this it appears that the valuation fixed in this case was anything but exorbitant or objectionable. A valuation fixed in good faith will never be lightly disturbed; it is absolutely binding and conclusive, except in cases of fraud or gross over-valuation.—2 Camp. R. 69; 1 Sumner's R. 451; Stev. & Ben. 7, 38, 39. In cases of open policies, where a loss occurs, the rule is, to ascertain the value of the goods at the port of shipment, and add the cost of insurance.—1 Arnould's Ins. 330. To provide a more perfect indemnity than this affords, the custom of using valued policies was introduced.—12 East 639, 488. It has been held, without the aid of any custom, that losses are to be settled as the court below directed in this case.—4 Howard's Miss. R. 63.

In this case, no question can be made as to the existence of a uniform, well known custom in the port of Mobile, both with assurer and assured, as to the mode of adjusting partial losses under valued policies. The existence of such a custom, and all the requisites to make a custom, were found by the jury; the contract was made in Mobile. This custom, then, must be taken as a part of the policy, and the parties must be presumed to have made their contract in reference to it.—3 Kent's Com. (7 Ed.) 326, note; 1 Arnould's Ins. 66, 72, 74, 75; Palmer

v. Blackburn, 1 Bing. 61; 1 Duer on Insurance 263 §57, 259, 265. An objection to it cannot be sustained on the ground simply of its being local, for, as between the parties contracting in the port where such uniform custom has prevailed, they will be held cognizant of it, and as dealing with a view to it.—See authorities last above cited; 1 Duer 286. And where the usage is purely local, if notice of its existence be brought home to the parties, it will be held to bind them, and will be treated as part of the contract.—1 Arnould on Ins. 72 *et seq.;* 1 Duer 304; 4 M. & W. 211; 3 Day's R. 346; 9 Wheat. 582; 4 Term R. 206, 216; 10 B. & C. 760; 4 M. & S. 150; 6 Har. & J. 408. And so if the trade be confined to a single port, and the usage is general there, it will be a good custom.—1 Duer 259, 294. Mobile is the only port in this State, and the proof shows a uniform, well established and well ascertained mode of settling such losses at that port.

The rule is well settled in England, that a custom as to the mode of settling a general average loss, at a foreign port of destination, is binding on the underwriters in England.–See cases cited in 1 Duer 247. The books on insurance shows that the custom proven to exist in Mobile is not so limited; it extends much further than to Mobile, and though greatly condemned by foreign authors, may almost be called the American custom. There are four modes in use for the adjustment of partial losses: 1, as a salvage loss, which is the mode adopted in Mobile; 2nd, on difference of sales, without reference to cost; 3rd, on comparison of net proceeds of sales; 4th, on comparison of gross proceeds of sales. In reference to the first of these Mr. Stevens remarks, that "it is particularly prevalent in the United States," and he attributes its existence here to our ignorance of any other mode. Its recommendation, however, lies in the fact, that it affords to the insured a "mercantile indemnity."

The nature and effect of a custom has been repeatedly considered by this court.—6 Porter 123; 3 Ala. 590; 12 Ala. 350; 12 Ala. 513; 10 Ala. 284; 7 Ala. 325.

LIGON, J.—The first assignment of error was not insisted upon, either in the argument or brief of the counsel for the appellants. It must, therefore, be considere as waived.—Van

Eppes v. Smith, 21 A. R. 317; Cunningham v. Carpenter, 10 A. R. 109.

The second arises upon the second charge given by the court below, in relation to the rule by which partial losses on valued policies of insurance are adjusted by the custom in the city of Mobile.

The evidence fully justified the court in submitting the question of the existence or non-existence of this custom to the jury in the manner in which it is presented by the charge, and in saying to them that, if they found the custom to exist, it must govern their action in assessing the damages.

The general law regulating the assessment of damages under such policies, even if it differed from this custom, must give way to it, if it is shown or may fairly be presumed that the parties contracted in reference to the custom, and not to the general law.

It is conceded that this policy was made in the city of Mobile, and that both the appellant and appellee do business in that city; and the proof, as shown by the bill of exceptions, is, "that by the custom of insurers and insured in Mobile, partial losses on closed policies are adjusted by paying the difference between the sales price of the injured article, and the price stipulated in the policy." The only legitimate inference from this proof (if indeed the language is not too plain to require an inference to be drawn) is, that this rule was known to and governed the action of all insurers and insured persons in the assessment of damages in cases of partial loss on valued policies, when the contract of insurance was made, and the owner of the goods resided in the city of Mobile.

In the absence of fraud in the valuation in the policy, or in the sales of the damaged article, the parties to this contract are bound by this usage; and it is shown in this case that both the valuation and sales were fair. Under such circumstances, the insurer will not be allowed to repudiate a custom in reference to which he is presumed to have contracted, and under which the insured had a right to expect that his loss, if any occurred against which he was protected by the terms of the policy, would be adjusted and settled.

To give validity to a usage of this kind, it is not necessary that it should extend to the whole State; if it is generally

known and acted upon in the port, city or town in which the policy is given, it will be sufficient. In his work on Insurance, Judge Duer uses, in reference to such usages, this language: "The proposition that a usage must be general, in order to bind the parties, refers exclusively to the cases in which the knowledge of the parties and their intention to adopt the usage are inferred merely from the fact of its existence; but when their knowledge, or intentions, are established by other direct or circumstantial proof, their contract will be governed by the usage, however local or partial, in reference to which it is proved or presumed to have been made. Thus, the use and practice, as between themselves and the assured, even of a single insurance company, will be binding, not only in all cases upon the company, but upon all such persons as have been in the habit of effecting policies in their office. So, by parity of reasoning, a local usage of trade may be binding upon insurers who have frequently made insurances to which the usage would apply; and however local or partial may be the usage, the insurers will be bound, in all cases, when the intention to follow it was expressly communicated, and the policy was founded upon that representasion."—1 Duer on Ins. 203 § 57.

Again; the same author, in speaking of general usages as applicable to the persons who recognize and adopt them, and to the ports in which they prevail, concludes his remarks with this expression: "It is not meant, for example, to deny that the insurers are bound in all cases by a usage generally followed and notorious, of the port in which they reside, however widely it may differ from the general usage of other ports engaged in the same trade. Their residence, where the usage, although local, is otherwise valid, would doubtless be deemed sufficient evidence of their knowledge."—1 Duer on Ins. 261 § 55, and authorities there cited.

If the usage is purely local, still, if notice of its existence is brought home to the parties, they will be bound by it, and unless otherwise provided in the policy itself, it will form a part of the contract of insurance, and be looked to by the courts in settling rights arising under it.—1 Arnould on Ins. 71 § 43, and authorities cited.

In this case, the usage referred to in the charge of the court is shown to be not only general, but universal, both with insu-

rers and insured in the city of Mobile; for the language of the bill of exceptions, setting out the evidence, is subject to no other legitimate construction; and as the parties do business in that city, and this policy was effected there, they must be presumed to have known of its existence, and to have contracted in reference to it.

This view of the case is decisive of it, and renders it unnecessary for us to examine it in all the aspects in which it has been presented in the briefs and arguments of counsel.

It is insisted, however, that the custom is repugnant to the terms of the policy, because the policy contains a stipulation that unless the damage to the tobacco exceeds 15 per cent., then the insurers are to pay nothing; and that under the calculation required by the custom, no per centum of loss can be ascertained. This by no means follows; for, when the damaged sales are subtracted from the value in the policy, the rate per cent. which the sum so obtained bears to the sum in the policy may be ascertained by a mere arithmetical calculation, and if it exceed the rate of 15 per cent., then the insurers must pay the whole loss; if it be less than that rate per cent., they pay nothing, inasmuch as the owners were their own insurers if the damage was not greater than that sum.

There is no error in the record, and the judgment must be affirmed.

STEWART & FONTAINE *vs.* HARGROVE.

1. On a motion by a bankrupt to have his discharge entered of record, where the record does not purport to set out all the evidence, and the motion itself is wanting, the Appellate Court cannot presume that there was no proof before the court below that an execution had issued, nor that the motion did not allege such to be the fact; and the rule laid down in Brown v. Branch Bank, 20 Ala. 420, does not apply to the case.
2. When the bankrupt's motion is resisted on any of the grounds specified in the act of Congress, the facts relied on to impeach his certificate must be stated with certainty to a common intent.

3. An allegation, in general terms, that the bankrupt had failed to file a full schedule of his notes and accounts, without specifying those which were omitted, is but the statement of a legal conclusion, and is also demurrable for want of precision and certainty.
4. An allegation that he had made a fraudulent conveyance of his property, without stating the person to whom the conveyance was made, or the property conveyed, is demurrable for the same reasons.
5. So, also, an allegation which does not set out the amount of a decree alleged to have been fraudulently omitted, nor the time of its rendition, is demurrable for want of sufficient certainty and precision.
6. The franchise of a toll bridge is property within the contemplation of the bankrupt law, and passes to the assignee in bankruptcy.
7. A plea alleging that a lien was created in favor of the contesting creditor before the bankrupt's application for the benefit of the act, by the delivery of an execution to the sheriff of a county in which there were slaves the property of the defendant, is defective in substance, if it does not also allege that the lien was continued up to the rendition of the decree.
8. Specifications contesting a bankrupt's discharge on the ground of fraud, are within the statute allowing amendments on terms after a demurrer is sustained.—(Clay's Digest 334 § 19.)
9. The court is not authorized to reject a plea containing matter which may be good, even though it is improperly pleaded.

ERROR to the Circuit Court of Russell.

Tried before the Hon. ROBERT DOUGHERTY.

THIS was a motion made by Hargrove in the court below, to enter of record his discharge from a judgment rendered against him at the Spring term, 1839, in favor of the plaintiffs in error, and also from the affirmance of the same judgment in the Supreme Court against himself and the said Elliott, who was his surety on the writ of error bond. The motion is not found in the record, but is referred to in the judgment, and appears to have been predicated upon the discharge of Hargrove under the bankrupt act of 1841.

The plaintiffs in error filed specifications against the validity of the discharge in bankruptcy on the ground of fraud, setting forth:

1. That the said Hargrove failed to file a full and complete schedule of the property owned by him or in his possession, to-wit: "One franchise or toll bridge across the Uchee Creek, in the county of Russell, on the road leading from Crawford to Columbus, Georgia."

2. That he made a fraudulent conveyance of property for the

purpose of defrauding his creditors, and that he failed to file a full schedule of all the notes and accounts in his possession or owned by him at the time of his filing his schedule in bankruptcy, but withheld the same for his own benefit.

3. That he withheld divers negroes in his possession, and failed to return them in his schedule, to-wit: (setting out the names of certain slaves:) and that he fraudulently conveyed said negroes for the purpose of defrauding his creditors.

4. That he was the owner of a certain decree rendered in the Superior Court of Muscogee County, Georgia, in favor of himself and Sophia Hargrove, against Owen Thomas, which he failed to return in his schedule.

The said Stewart & Fontaine also pleaded "that before the application in bankruptcy made by Hargrove, the judgment was in being, and that an execution had issued thereon, and was in the hands of the proper officer of Russell County to be executed; and that there were negroes, the propepty of said Hargrove, in said county liable to the levy of said execution, which have not been sold under the same." The plaintiff demurred to each of the specifications, and also to the plea; and the court sustained the same, as to the first, second and fourth specifications, and also to the plea, and overruled the demurrer to the third specification.

The defendants then tendered the following pleas:

1. That the said plaintiff ought not to have or maintain his said motion, because they say the said plaintiff obtained his certificate in bankruptcy by fraud, for that the said plaintiff, before and at the time of filing his schedule in bankruptcy, was the owner of a certain franchise, being the right to take and receive toll for crossing the Uchee Bridge, across the Uchee Swamp, on the road leading direct from Crawford in said county to the town of Girard in said county, and the city of Columbus, in the State of Georgia, and the said plaintiff did then and there fail and neglect to render said franchise in his said schedule, but fraudulently retained the same to his own use.

2. And for further plea in this behalf, the defendants say that the said plaintiff obtained his said bankrupt certificate by fraud, because they say that, before and at the time of filing said plaintiff's petition for the benefit of the bankrupt act, said plain-

tiff was the owner of a certain franchise, being the right to take toll for crossing the Uchee Bridge in the first plea mentioned; and that said plaintiff, before and at the time of filing his said petition, and in contemplation of the same, and of his becoming a bankrupt, did fraudulently procure to be transferred to the names of Hartwell B. Green and William Grigg the legal title to said franchise, and yet himself continued to enjoy the profits of the same up to the expiration of the time for which the same was granted.

3. And for further plea defendants say, that the said plaintiff obtained his certificate in bankruptcy by fraud, because they say that, at the time and before the said plaintiff filing his petition in bankruptcy, the said plaintiff was the owner of a certain money decree for the sum of $1067 25, rendered by the Superior Court of Muscogee County, in the State of Georgia, upon an award of arbitration made the 4th day of June, 1842, in favor of the said plaintiff and his wife against one Owen Thomas, which said decree was, at the time of plaintiff's filing his schedule in bankruptcy, in full force, unreversed and unsatisfied; and the said plaintiff did then and there fraudulently fail and neglect to render said decree in his said schedule in bankruptcy, but fraudulently withheld the same for his own benefit and use.

And for further plea defendants say, that said plaintiff obtained his certificate in bankruptcy by fraud, because they say that, before the filing of plaintiff's petition in bankruptcy, said plaintiff, in contemplation of said bankruptcy, and to defraud his creditors, fraudulently and without consideration conveyed to one T. P. Park the following named negro slaves, to-wit: (setting out certain slaves, their names, ages and value.)

4. And for further plea defendants say, that the said plaintiff obtained his certificate in bankruptcy by fraud, because they say that, before and at the time of filing his petition in bankruptcy, the plaintiff was the owner of the following described negro slaves, to-wit: (describing certain negroes by their names and ages;) which said negro slaves were, before and at the time of plaintiff filing his petition in bankruptcy, owned by the said plaintiff, and in his possession; and that the said plaintiff did then and there fraudulently fail, neglect and refuse to render said negro slaves in his said schedule in bankruptcy, but fraud-

ulently withheld the same to his own use and benefit; all of which they are ready to verify," &c.

To the filing of these pleas the plaintiffs objected; the objection was sustained, and the defendants excepted.

On the trial the defendants offerred to prove that said Hargrove was the owner of the franchise as described in defendants' first specification, and that he fraudulently omitted to return it in his schedule, to which plaintiffs objected; the objection was sustained, and the defendants excepted.

The defendants also offeed to prove that the said Hargrove was the owner of the decree described in the fourth specification, and that he fraudulently omitted to return the same in his schedule in bankruptcy; to which the plaintiff also objected, the objection was sustained, and the defendants excepted.

The rulings of the court as set out in the record, are assigned for error in this court.

Geo. D. Hooper, for plaintiffs in error, contended:

1. That the motion was erroneously granted, because not based on any suggestion, allegation or proof that an execution had issued on the judgment.—Brown v. Br. Bank, 20 Ala. 420.

2. That the judgment is erroneous, because both defendants are actors in the motion, and recover costs, although only one bankrupt is to be discharged.

3. That it was erroneous to sustain the demurrer to the plea setting up a former lien, existing before the discharge. If the plea was rightly pleaded, then plaintiffs in error had a right which was not the subject of divestiture; and how could their right be exercised, if their judgment was destroyed? The plea must be liberally construed.—Powell v. Knox, 16 Ala. 365.

4. That it was error to refuse permission to plaintiffs in error to prove that Hargrove owned a franchise in a toll-bridge, and an interest in a certain judgment, both of which he fraudulently omitted from his schedule.

5. That, if the specifications were required to be made matters of pleading, when ruled insufficient for want of form, leave to plead over should have been given. The pleas, *in extenso*, connected with allegations of fraud, were good, and should have been admitted. The demurrers relate back to the motion or declaration, and must be visited upon it.

He cited the following cases, "miscellaneously brought together, some of which may illustrate the matters of the record."—Lacy v. Rockett, 11 Ala. 1002; Vance v. Wells, 8 Ala. 401; Gray v. White, 5 Ala. 490; Stiles v. Lacy, 7 Ala. 17; Jefford v. Ringgold, 6 Ala. 546; Freeny v. Ware, 9 Ala. 370; Robb v. Powers, 7 Ala. 658; Gary v. Bates, 12 Ala. 544; Doremus v. Walker, 8 Ala. 194; Stewart v. Anderson, 10 Ala. 504; McDougald v. Reid, 5 Ala. 810; Cogburn v. Spence, 15 Ala. 549; Mabry v. Herndon, 8 Ala. 849; Abney v. Kingsland, 10 Ala. 355; Hargrove v. Cloud, 8 Ala. 173; Gilbert v. Bradford, 15 Ala. 769; Childs v. Franklin, 10 Ala. 80; Reavis v. Garner, 12 Ala. 661; Petty v. Walker, 8 Ala. 379; Ewing v. Peck & Clark, 17 Ala. 339; 5 U. S. Laws 28, 29.

Belser & Rice, *contra:*

1. The decree in bankruptcy *prima facie* discharged Hargrove from all his debts existing at the date of the petition.—McDougald v. Reid, 5 Ala. 810.

2. The record does not show the true character of the motion, and the case, as set forth in the bill of exceptions, does not come within the authority of Brown v. Branch Bank, 20 Ala. 420, which says, without execution issued, the motion to satisfy cannot be made. If the case did fall within the principles of that decision, the decision ought to be set aside.—Francis v. Ogden, 2 Zabrouski's R. 210, and authorities cited by Chilton J. in his dissenting opinion in Brown v. Branch Bank, *supra.*

3. The certificate of the bankrupt can only be impeached for causes set forth in the act of Congress, and then only on proper specifications.—Petty v. Walker, 10 Ala. 379; Mabry v. Herndon, 8 Ala. 848.

4. The specifications which were served on Hargrove are, with the motion, the proper pleadings in the cause, and no other issues ought to be permitted.—Petty v. Walker, *supra.*

5. The court properly sustained the demurrer to the first, second and fourth specifications; they are all too general in their character, and the first contains matter irrelevant to the issue.—Mabry v. Herndon, 8 Ala. 848; Rugely v. Robinson, 19 Ala. 405; 13 Serg. & Rawle 210.

6. The pleas were properly rejected by the court; they are

but an enlargement of the original specifications. Hargrove had no notice of them until the trial, and they are outside of the issues in the cause.—Petty v. Walker, 10 Ala. 379; Williams v. Sinclair, 3 McLean 289; Harding v. Griffin, 7 Blackf. 462; 4 Dana 269.

7. The demurrers to the two special pleas should have been sustained; they both lack substance, and do not come within the issues.—Doremus v. Walker, 8 Ala. 202; Freeny v. Ware, 9 Ala. 370; Stewart v. Anderson, 10 Ala. 504; Reavis v. Garner, 12 Ala. 661.

8. The evidence offered and rejected was only applicable to the first and fourth specifications, the demurrers to which had previously been sustained: it was applicable to no issue then before the court; it related only to the franchise and to the decree.—Petty v. Walker, *supra*.

9. The decree alluded to shows no such interest in Hargrove as could pass to the assignee in bankruptcy; hence it was not necessary to mention it in his schedule.—Rugely v. Robinson, 19 Ala. 405; Reavis v. Garner, 12 Ala. 661.

GOLDTHWAITE, J.—The motion made by the defendant in error, Hargrove, is not to be found in the record, except as it appears in the judgment entry. It is there referred to as a motion, on the part of Hargrove, to enter of record his discharge from a judgment rendered at the Spring term, 1839, of the Circuit Court of Russell County, upon the ground, so far as we can learn from the entry and the other portions of the record, that he had been discharged in bankruptcy under the act of Congress of 19th of August, 1841. As the record does not purport to set out all of the evidence, and the motion itself is wanting, we cannot say that there was not proof before the court that an execution on the judgment referred to had issued before the motion was made, nor can we say that the motion did not allege that such was the case; and we cannot, for these reasons, apply the rule laid down by this court in the case of Brown v. The Branch Bank, 20 Ala. 420, holding that a bankrupt could not move to have his discharge entered of record for the purpose of preventing the issue of an execution. We must, therefore, examine the rulings of the court below upon some of the other points embraced by the assignments of error.

The fourth section of the bankrupt act provides, that the discharge and certificate of the bankrupt shall be conclusive evidence in his favor, unless "impeached for some fraud or wilful concealment by him of his property or rights of property, contrary to the provisions of the act, on prior reasonable notice specifying in writing such fraud or concealment." The motion of the plaintiff below being predicated upon his discharge in bankruptcy, it might properly have been resisted upon the grounds and in the mode specified by the act, either by plea, replication or notice in writing, according to the character of the proceedings against the bankrupt; but whatever mode is adopted, the fraud or concealment must be set forth in writing, and with that degree of certainty and precision which will enable the court to determine whether the facts alleged are sufficient in law to impeach the decree, and the party to meet the charge; or, in other words, the facts which are relied on to impeach the certificate, must be stated with certainty to a common intent.

Applying this rule to the case under consideration, we have no difficulty in arriving at the conclusion that the court did not err in sustaining the demurrer to the second and fourth specifications. The mere allegation, in general terms, that the bankrupt failed to file a full schedule of the notes and accounts held by him, without specifying which were omitted, and generally that he had made a fraudulent conveyance of his property, without stating the person to whom the conveyance was made, or the property conveyed, are legal conclusions, and are also wanting in that degree of precision and certainty which the rules of pleading require. The last objection also applies to the fourth specification, which sets out neither the amount of the decree nor the time of its rendition.

But the court erred in sustaining the demurrer to the first specification, which, in substance, alleged that Hargrove fraudulently omitted from his schedule a franchise consisting of a toll bridge over Uchee creek, in the county of Russell, on the road leading from Crawford to Columbus, Georgia. That a franchise of this description is property, was decided in the case of Lewis v. The Intendant of Gainsville, 7 Ala. 35; and we can perceive no valid reason why, as such, it should not pass to the assignee of the bankrupt.

There was no error in sustaining the demurrer to the plea,

which we regard as defective in substance. It alleges that, before the application of Hargrove for the benefit of the act, the judgment, in relation to which the motion was made, had been rendered, and an execution issued thereon, which had been delivered to the proper officer of Russell County to be executed, and that there were slaves, the property of Hargrove, in said county, liable to the levy of the execution, which had not been sold under the same. There is no doubt that, under the decisions of this court, any lien which was in force during the proceedings in bankruptcy would be preserved, (Doremus v. Walker, 8 Ala. 194; Freeny v. Ware, 9 Ala. 370;) but the lien acquired by the plaintiff in the judgment, by the delivery of the execution to the sheriff, is lost, unless continued by the renewal of the execution from term to term. The plea shows merely that a lien had been created, prior to the application in bankruptcy, but is defective in not showing that it continued up to the rendition of the decree.

We think, however, that the court erred in the rejection of the pleas which were tendered after the demurrer was sustained, at least as to such of them as might properly be regarded as amendments to the former specifications, which had been adjudged defective. The statute, (Clay's Dig. 334 § 19,) in direct words, allows amendments on terms after a demurrer is sustained, and we are unable to perceive any reason why its provisions should not extend to specifications contesting a decree in bankruptcy on the ground of fraud. Indeed, we are of the opinion that it falls directly within the terms of the act.—It would, of course, be the duty of the court to see that the other party was not prejudiced, by being forced into trial without reasonable notice of the facts set up by the pleas, which could be accomplished by the postponement or continuance of the trial, and such other terms might also be imposed as would meet the justice of the case; but to refuse under such circumstances a specification or plea, contesting the discharge on grounds allowed by the act, might operate to sustain fraud, and is certainly in opposition to the spirit of the statute before referred to. It will be observed, that we do not intend to decide whether the matters embraced in the pleas were well pleaded: our decision goes only to the extent, that a franchise in the bankrupt consisting of the right to take tolls for crossing at a

bridge or causeway, is a species of property which will pass to the assignee in bankruptcy; that the interest which he has in any decree or judgment also passes, and that the court is not authorized to reject a plea which contains matter which may be good in defence, even if it were improperly pleaded.—Carpenter v. Jeter, 4 S. & P. 326.

The judgment is reversed, and the cause remanded.

MITCHELL, ADM'R, *vs.* GATES.

1. The rule now well settled in relation to ante-nuptial deeds is this: that to prevent the husband's marital rights from attaching to the wife's personal chattels, the deed itself must show a clear and plain intention to exclude them.
2. A deed executed by a feme sole the day before her marriage with an insolvent man, conveying all her property real and personal to a trustee, in trust that he "shall permit her to remain in quiet and peaceable possession" of the same, "and take the profits thereof to her own use, and the increase, interest and income thereof to her own use and benefit during her natural life, and at her decease to descend and go to her heirs absolutely forever," does not exclude the husband's marital rights.
3. The condition of the parties at the time the deed was made is admissible evidence, but the acts and declarations of the husband after marriage cannot be received to show the true construction of the deed.

ERROR to the Circuit Court of Franklin.
Tried before the Hon. THOMAS A. WALKER.

DETINUE by Reuben Mitchell, the plaintiff in error, as administrator of Philip Gates, deceased, against Valentine Gates, the defendant in error, for certain slaves.

The defendant relied on a purchase from the wife of said Philip Gates, made after her marriage, she claiming a separate estate in them under the following deed, made by herself:

"This indenture, made this 22nd day of January, 1825, between Margaret Henley of the first part and Elijah Henley of the second part, witnesseth: That, for and in consideration of the sum of one dollar to the said Margaret Henley in hand paid, the receipt whereof is hereby acknowledged, the said party of

the first part hath given, granted, bargained, sold, aliened and confirmed, and by these presents doth give, grant, bargain, sell, alien and confirm to the said Elijah Henley of the second part, his heirs and assigns forever," (here follows a description of the property conveyed, consisting of a certain tract of land, several negroes and other personal property,) "the property of and belonging to said Margaret Henley of the first part: To have and to hold the said hereby granted or intended to be granted premises, and tract or parcel of land, with its appurtenances, and together with the aforesaid slaves and future increase of the females thereof, and all the other personal property hereby conveyed, unto the said Elijah Henley, his heirs, executors, administrators and assigns forever; and the said Margaret Henley, for herself, her heirs, executors, administrators and assigns, doth hereby covenant, promise and agree, to and with the said Elijah Henley, his heirs, executors, administrators and assigns forever, in manner and form following, that is to say, that the said Margaret Henley, her heirs, executors, administrators and assigns, the aforesaid tract or parcel of land and premises, with their appurtenances, together with the aforesaid slaves and the future increase thereof, and all the personal property hereby conveyed, unto the said Elijah Henley, his heirs, executors, administrators and assigns, against all persons whatsoever, shall and will forever warrant and defend by these presents; upon trust, nevertheless, that the said Elijah Henley, his heirs, executors, administrators and assigns, shall permit the said Margaret Henley to remain in quiet and peaceable possession of the said tract or parcel of land and premises, and its appurtenances, together with the aforesaid slaves and other personal property hereby conveyed, and take the profits thereof to her own use, and the increase, interest and income thereof to her own use and benefit during her natural life, and that at the decease of the said Margaret to descend and go to her heirs absolutely forever.

"In witness whereof the parties to these presents have hereunto set their hands," &c.

"In connection with this deed, and as tending to show that a separate estate in the slaves sued for, who were descendants of the slaves conveyed, to the said Margaret, not subject to the marital rights of her husband, the intestate of the plaintiff, the defendant introduced evidence that the said deed, so made

by the said Margaret to the said Elijah Henley, was executed on the day before the marriage of the said Philip with the said Margaret, and with his knowledge and assent; to the introduction of which evidence, for the purpose aforesaid, the plaintiff objected, but the court overruled the objection, and permitted the same to go to the jury; and therefore the plaintiff excepts.

"Defendant also adduced in evidence before the jury, by witnesses sworn and examined, that Philip Gates was insolvent before and after his said marriage with the said Margaret, and that he often and always spoke of the said slaves, and the increase of said slaves, as his wife's separate estate, and said often, whilst said slaves were on the farm where said Philip lived, they were hers and not his. It was also proved that said Philip lived and died on the land of Young Henley, the son of said Margaret, and that said Margaret survived her husband. To this proof the plaintiff objected; but the court overruled his objection, and allowed it to go to the jury, in connection with the deed, and plaintiff excepted.

"After the case was closed, and had been argued to the jury by the counsel, the plaintiff asked the court to charge the jury, that the said deed from the said Margaret to the said Elijah Henley did not create a separate estate in the said Margaret in the slaves mentioned therein, so as to defeat the marital rights of her husband, the said Philip Gates, after his marriage with the said Margaret. This charge the court refused to give, but charged the jury that said deed, when connected with proof of the fact that said deed was executed the day before the marriage of the said Margaret with the said Philip, did invest said Margaret with a separate estate in said slaves named in said deed, and in the descendants of said slaves; and that the said slaves remained the separate property of the said Margaret, notwithstanding her said marriage with said Philip, and discharged from his marital rights; and that the jury might look to the evidence of said Gates' admissions, to show the nature of the possession of said slaves, made while said slaves were in his possession. To the refusal of the court to charge as requested, and to the charge given, the plaintiff excepted."

The above rulings of the court to which exceptions were taken are now assigned for error.

L. P. & R. W. WALKER, for plaintiff in error:

The question here is one of *construction* simply; the deed is valid or void according to the significancy of its own words, and not otherwise.

According to the principles of the common law, the husband and wife are regarded as one person, and her legal existence is suspended during the continuance of the coverture. From this principle it results that, at law, no contracts can be made between husband and wife; they are mere nullities. Yet, if these admissions are to be received as binding on Gates, they establish a contract between Gates and his wife, after coverture, which is made to affect his title to property acquired by the marriage.

Again; the admissions of Gates were made to have an effect which would not have resulted from a deed executed by him during coverture, conveying this property to his wife in the language of his admissions. Such a deed does not divest the estate of the husband in a court of law.—11 Ala. 966. As to the admissions, see 15 Ala. 373.

2. The deed from Margaret Henley to Elijah Henley, made before her marriage with the plaintiff's intestate, did not create a separate estate in the wife, and the property having gone into the possession of her husband, became his and liable to his debts. Lenoir v. Raney, 15 Ala. 667; Machen v. Machen, 15 Ala. 373; Pollard v. Merrill, 15 Ala. 169; 12 Ala. 49, 630; 17 Ala. 637.

It must appear that it was the intention of the parties to secure the property to the use of the wife, in such a mode as to be inconsistent with the enjoyment by the husband, or with the exercise of dominion over it by him.—Cook v. Kennerly, 12 Ala. 42, 46; Newman v. James & Newman, 12 Ala. 32.

In the case from 12 Ala. 32, *supra*, the words "for her use, benefit and right," standing alone, were not held to be sufficient to create a separate estate; but when it was added, "without let, hindrance or molestation whatever," these words were held to indicate a clear intention to create a separate estate.

The intent to exclude the marital rights of the husband, must be evinced by the language employed in the creation of the estate; and no matter what the surrounding circumstances may be, they will not be sufficient to establish the intent in

the absence of language, evincing the intent, in the creation of the estate.—12 Ala. 47, 635.

The only question now is, whether the words in this deed are sufficient to show that the grantor meant to reserve to herself a separate estate, independent of the husband.—Lee v. Preaux, 3 Bro. Ch. 387, cited and approved in 12 Ala. 634; 12 Ala. 174; 15 Ala. 174. Does it appear unequivocally on the face of the instrument, that the intention was to exclude the husband from any interference with the property conveyed?—12 Ala. 635; 15 Ala. 174.

In Pollard *et al.* v. Merrill & Eximer, 15 Ala. 174, this court say, unless by the terms of the deed the husband is excluded by the creation of a separate estate, the property is subject to his debts, notwithstanding the provision in the deed expressly to the contrary. This is certainly a much stronger case than the mere parol declarations of the husband, made after the execution of the deed, that the property was not his but his wife's.

The husband, having the possession, is entitled to all the rights in the property secured by the deed to the wife, and as the limitation over could not take effect, the absolute proprietorship in the property vested in the husband.—15 Ala. 669 (670.)

The intervention of a trustee in whom the legal title is vested makes no difference.—15 Ala. 174, 666; 19 Ala. 148. The case of Strong *et al.* v. Gregory, 19 Ala. 146, does not conflict with the plaintiff's rights in this case.

That was the case of an ante-nuptial contract, by which it was agreed that after the marriage the property of the wife should be settled and secured by conveyance, upon a trustee for the use and behoof of the wife.

In that case, this court say, that the same words are not to receive the same construction in every instrument, or, rather, the same intention is not always evinced in every instrument by the use of the same words.—(149.)

And the court say further, that if property be conveyed to a trustee for the use of a married woman, the marital rights of the husband will not be excluded, because it does not appear (from such language) that such was the intention of the grantor. But the decision in that case is placed upon the ground that the husband and wife, before marriage, stipulated that, after the marriage, they would settle the property on a trustee, for the use

and behoof of the wife. And the court ask the question, if it were not intended that the wife should take a separate estate, why settle one part on the trustee for the use of the husband, and another part for the use of the wife?—(149.)

And the court further say (150) that, if the husband had the power of disposition of the whole for his benefit, such a power would be inconsistent with a separate estate in the wife.

Under this deed, upon the marriage, Gates certainly had the "power of disposition of the whole property."

William Cooper, *contra*:

It is insisted on the part of the defendant that a separate estate was secured to the wife, and that the decisions of this court settle the rule, that, if the intent of the parties can be obtained from the contract, however informal and clumsy the instrument may be, this court will sustain the intent. The following decisions of this court are relied on: Newman v. James, 12 Ala. 29, where the words, "to have and to hold to her and her heirs, to and for her use, benefit and right, and her heirs, without let, hindrance or molestation whatever," were held to create a separate estate in a feme covert; Brown v. Johnson, 17 Ala. 232, where the words were, "to her and her heirs after her, free from the claim or claims of any manner of persons whatever, absolutely, as their own property, as if they had bought them; Williams v. Maull, 20 Ala. 721, where the bequest was to the testator's daughter, "to be held in trust for her," &c. "and the labor and increase shall not be subject to her present or future husband's debts," and it was held to create a separate estate as against the husband and his personal representative; Strong v. Gregory, 19 Ala. 146, where an ante-nuptial contract that certain property, after marriage, should be conveyed to a trustee for the use of the wife, was held to mean her separate use; Lucas v. Kernodle, 2 Ala. 199, where a father, by deed, conveyed property to a trustee "for the use of his daughter, the hire to be paid to her, and at her death to go to her children," and it was held to create a separate estate; Gould v. Hill, 18 Ala. 84, where the gift was to a married woman, "exclusively to her," and it was ruled to be a separate estate. These cases all show that the court will be governed by the general context and terms of the deed, and if it shows that a separate estate

was intended, the court will carry out and give effect to that intention. Now, what was the object of Margaret Henley's conveying her own estate to a trustee, to hold it that she might have it, and the issues and profits thereof, to her own use? And why did her intended husband assent to it? And why was it made the day before her marriage? She held the property before the deed; and if she was to hold it afterwards as she did before, then it was not good nonsense to make it.

In addition to the authorities above cited from our own decisions, there are many English cases to the same point.—See Pritchard v. Ames, 1 Term R. 222, where the words were, to have and to hold "for her own use and her own disposal;" Tyrrell v. Hope, 2 Atk. 558, where the words were "she shall enjoy the issues and profits;" 1 White & Tudor's Leading Cases 324; Staunton v. Hall, 2 Russ. & Myl. 180, "to be delivered to her demand;" 2 Coxe 414, "a gift to her use;" Jacob v. Amyatt, 1 Madd. 370, "to her own use and benefit;" 4 Madd. 409; Jones v. Lockhart, 3 Brown's C. C. 383; Roberts v. Spicer, 5 Madd. 491; Kensington v. Dolland, 2 Myl. & K. 184; Tyler v. Lake, 4 Sim. 144, or 2 Russ. & M. 183, where the words were "for her own use and benefit;" 2 Hare 49, where the words were "to her own use and benefit." In all these cases, the words were held to create separate estates in married women, though the technical term, "for her sole and separate use," was not used in any of them.

There are also many American cases of like purport.—Steel v. Steel, 1 Iredell's Eq. R. 452, which was a bequest to a married woman "for her own use," and was held to create a separate estate in her; 6 Serg. & Rawle 466, which was a devise to a married woman, "for her and her family use, for her life"; 5 Barr 385, "for the entire use, benefit, profit and advantage" of a married woman; Heathman v. Hall, 3 Iredell's Eq. R. 414; Hamilton v. Bishop, 8 Yerger 33, 40; Bridges v. Wood, 4 Dana 610, where the gift was to a *feme covert*, "and to her disposal, and to her and her heirs forever"; Warren v. Haley, 1 Sm. & Mar. Ch. 647, where the gift was to a trustee, "for the proper use and benefit of a *feme covert* and her heirs."—All these cases fully maintain the rights of married women, and the true reason is given in all of them, to-wit: that here, as in other cases, the intention of the party is the rule of con-

struction, when it can be attained without violating any rule of law.

Evidence of the condition of the parties at the time the deed was executed, and the objects they had in view, was properly received.—Strong v. Gregory, 19 Ala. 146.

The declarations and admissions of the husband after marriage, while the slaves were in the possession of him and his wife, were competent to show the nature of the possession, and that he did not hold as owner.—DeGraffenreid v. Thomas, 14 Ala. 681; Hall v. Stone, 14 Ala. 803; Nelson v. Iverson, 19 Ala. 95; Inge v. Murphy, 10 Ala. 885; Williams v. Maull, 20 Ala. 721.

It is further insisted, that, whenever a court of equity would construe a contract as creating a separate estate, a court of law will give the same relief.—2 Roper on Husband and Wife 168; 3 Term R. 620; 16 Ala. 486. And restraints on the forms of the disposition of the property only continue while she is *covert*, and are removed by her becoming single.—1 White & Tudor's Eq. Cas. 367; Newton v. Reid, 1 Sim. 141; Brown v. Pococke, 5 Sim. 663; Woodmeister v. Walker, 2 Russ. & M. 207; Tullitt v. Armstrong, 1 Beavan 1.

The existence of the trustee does not prevent the legal control of the same by the usee, if the deed permits the latter to hold possession; and an execution at law can be levied on it for the usee's debts, notwithstanding the deed of trust.—Kennerly & Smith v. Cook, 12 Ala. 42; Clark & Co. v. Windham, 12 Ala. 801; 7 Ala. 32.

PHELAN, J.—The main question to be decided here relates to the true construction of this deed in trust, made by Margaret Henley to Elijah Henley, the day before her marriage with Philip Gates.

The rule now well settled in relation to all such deeds, is this, that to exclude the right of the husband from attaching to the personal chattels of the wife, which is and always has been considered a right upon which the law looks with favor, the deed itself must show a clear and plain intention to that effect. The law makes one rule, conceived to be a good one; now, by that same law, a single woman, or her friends and advisers, may make a law for themselves, a law for her particular case, which

shall set aside and annul, to that extent, the general law of the land. It is, then, insisted, that this shall be done in such manner as to make that purpose plain. The husband is by force of circumstances not an actor here. He stands upon his rights, his general legal rights, which the other party in the exercise of a legal right is supposed to be desirous to take away from him.—He relinquishes nothing; the other party only determines that she will exercise the power conferred on her by law while sole, of taking certain prospective rights from him to herself. There can be no sounder or better principle then, to govern in such a case, than to say the general law in his favor will stand and prevail unless it is clearly and plainly changed; unless the terms of the particular law, so to speak, are as explicit and unambiguous as the general law and the rights under that general law which are intended to be taken away. Hence the rule, that to confer a separate estate upon a married woman, the words of the deed or instrument must plainly show, of themselves, the intention to confer upon her a *separate estate*, or, what amounts to the same thing, to *exclude* the *marital right* of the husband over the property. The books are so full of this that it is needless to cite any other than a few of the later authorities.—Cook v. Kennerly, 12 Ala. 42; Pollard v. Merrill, 15 Ala. 169; Geyer v. Br. Bank at Mobile, 21 Ala. 414; Brown v. Johnson, 17 Ala. 232; Gould v. Hill, 17 Ala. 84; 8 Yerg. 33.

Do, then, the words of this deed show a plain intention to exclude the marital right of the husband? The terms chiefly relied on to show this, are the words, "to remain in peaceable possession," &c., "and to take the profits thereof to her *own* use, and the increase, interest and income thereof to her *own* use and benefit, during her natural life," &c., &c., and then "to descend to her heirs," &c.

The force of this word "*own*" has been often considered in this connection, and sound criticism has pronounced that it cannot be held to be equivalent to *sole* or *separate*. It does not point at the *marital right*, as these do. To say we take property to our *own* use, seems mainly intended to negative the idea that we are taking it for another, with some trust or agency.—"To have and hold the same to his own proper use and behoof," are words to be found in almost every deed a man takes to himself for land in fee simple, or absolute bill of sale for chattels.

It is a common sort of tautology, more used for sound and emphasis than to express any special quality of ownership out of the ordinary way. "To his use," "to his *own* use," "to his *own* proper use and behoof,"—what are they, but the same thing? The meaning of the first words is not amplified in the least when we get to the last. There are more words, but that is all; you gather no new idea. There is nothing besides in the deed which serves to take these words out of their ordinary signification. These, of themselves, will not create a separate estate in a married woman, even when the deed is made by herself, of her own property, on the day before her marriage, and when the man she is about to marry is insolvent.—Tyler v. Lake, 2 Russ. & M. 183, and cases there cited; Haig v. Haig, 1 Dess. 348; Lamb v. Wragg, 8 Por. 73; Lamb v. Milnes, 5 Ves. 521; Kensington v. Dolland, 2 M. & K. 184.

That both she and the man she was about to marry may have intended such a thing, is every way probable; and if we were left to govern our action by conjectures, as to their intention, it would not go hard so to decide. But in the construction of what is written, we have but one way to get at the writer's meaning, and that is, through what he says, subjected to sound rules of criticism, rules proper to govern now and hereafter.

True, every instrument is to be viewed by the light of surrounding circumstances. The condition of the woman, and the man she was about to marry, at the time the deed was made, were therefore proper subjects of evidence, and so far the court did right in admitting the evidence objected to; beyond this it was not proper to go; what Gates said, after the marriage, or what he did, was not proper to show the true construction of this deed, and should have been excluded. If circumstances admitted in proof could be allowed to control the construction of this instrument, they would make the deed another deed; they would change its character altogether. It would be to say, that if a woman marries a solvent man, certain words will not create a separate estate; if she marries an insolvent one, they will. So that it would come to this: the condition of the husband, and not the words employed, would make the deed. And if what the husband did or said after the marriage could be looked to at all, the same effect would be given, not only to facts

and circumstances existing at the time, but to such as took place after the deed was made.

Where the instrument is complete as to the interest or right conveyed, and where it is only executory, we admit a just distinction is taken as to the meaning to be put on particular words. Strong v. Gregory, 19 Ala. 146. Here the instrument is not executory, but complete.

It will be seen that we think the court below erred, both in the charge which was given and in the refusal to charge as requested.

Let the judgment be reversed, and the cause remanded.

WALKER *vs.* JONES.

1. When the proponent of a will is the husband of one of the legatees, his declarations that the testator was of unsound mind when it was executed cannot be received to invalidate the will.
2. When one of the heirs at law appears and contests the validity of the will, he cannot be heard to assign for error that there were other resident heirs who were not duly notified and who did not appear.
3. When a special term of the court is appointed by consent for the trial of an issue *devisavit vel non*, the contestant is estopped from raising the objection that the court could not hear and render judgment in the cause at any other than a regular term.
4. An instrument purporting on its face to be a deed, acknowledged by the maker before a justice of the peace to have been signed and delivered as such on the day of its date, and conveying by present words of gift, in consideration of natural love and affection, to several of the maker's children, specific legacies of slaves and all the money and notes and household and kitchen furniture on hand at the time of his death, but reserving to him the right of ownership over the slaves until his death, at which time it is declared, "this deed shall take effect," held a will and not a deed.

APPEAL from the Court of Probate of Dallas.

THE appellee, John B. Jones, applied to the Court of Probate of Dallas for letters of administration with the will annexed on the estate of John Walker, deceased, which were granted to him. He then propounded for probate, as the last will and tes-

tament of said decedent, the following instrument, as set out in the record :

" THE STATE OF ALABAMA, } Know all men by these pres-
DALLAS COUNTY, } ents, that I, John Walker, of the county and State aforesaid, for and in consideration of the natural love and affection which I have for my beloved daughter Nancy Jones, wife of John B. Jones, do give and grant to her, to have, to hold and to enjoy, to the only true and proper use and behoof of herself and the heirs of her body forever, the whole and entire right, title and interest, in and to, of any kind whatever, a certain negro boy Frank, (otherwise Henry,) a slave for life ; but I reserve to myself, nevertheless, the right to exercise ownership over the said slave Frank (otherwise Henry) until my death, should I at any time see fit to demand him of the said Nancy Jones or her said husband ; otherwise, she and her said husband are to have his labors, hire and profit of every kind until my death. And in like manner I give my old servant woman, Betty, to my daughter Nancy Jones, that she may be taken care of in her old age, as she is now valueless. And I also give and grant to my beloved son, James W. W. Walker, for and in consideration of the natural love and affection which I have for him, a certain negro boy, Washington, to have, to hold and to enjoy to the only true and proper use and behoof of himself and the heirs of his body forever ; but I reserve, nevertheless, as aforesaid, to myself, the entire right to exercise ownership over the said boy, Washington, and to receive the hire, labor and profits of the said boy during the term of my natural life, but at my death this deed shall take effect. And I also give and grant to my beloved grand-son, Granberry White, for and in consideration of the natural love and affection which I have for him, a certain negro man, Saunders, a slave for life, to have, to hold and to enjoy to the only proper use, behoof and benefit of himself and the heirs of his body forever ; but I reserve to myself, nevertheless, the right to exercise ownership over the said boy, Saunders, and to have his labor, and receive his hire or profits in every way and of every kind whatever, for the term of my natural life, but after my death this deed shall take effect. And I also give and grant to my beloved daughter, Martha White, otherwise Martha Perkins, a certain gray horse which she now has in possession, and I also give and forgive her

the whole of the amount she purchased at my sale, and also all other sum or sums of every kind whatsoever, which I ever may, at any time, have had against her, the said Martha White, othwise Martha Perkins, to have, to hold and to enjoy to the only proper use, behoof and benefit of herself and the heirs of her body forever. And furthermore I also give and grant and forgive, to each and every of my children and grand-children, all claim or claims of whatever kind which I ever may have had against them or any of them, at any time, to have, to hold and to enjoy to the only proper use, behoof and benefit of themselves and their heirs forever. And I furthermore give and grant to my beloved three children, Nancy Jones, wife of John B. Jones, Martha White, otherwise Martha Perkins, and to James W. W. Walker, for and in consideration of the natural love and affection which I have for them, all the money and notes which may be on hand at the time of my death, which said money and notes shall be equally divided amongst them, share and share alike, to have, to hold and to enjoy to the only true and proper use, behoof and benefit of themselves and each of them and their heirs forever. And, for and in consideration of the natural love and affection which I have for my beloved daughter, Nancy Jones, aforesaid, I further give and grant unto her my bed and furniture, my arm-chair and bed-clothes, and finally, all the little household and kitchen furniture of whatsoever kind that may be on hand at the time of my death, to have, to hold and to enjoy to the only proper use, behoof and benefit of herself and her heirs forever. And I further give unto my beloved grand-son, Granberry White, aforesaid, my saddle and bridle, to have, to hold and to enjoy to himself and his heirs forever; but I reserve to myself, nevertheless, the right to use them until the time of my death.

Postscript: Interline before assigning, May 18, A. D. 1847.

Attest: John Whitt, Jr. (signed.) JOHN WALKER, [L. S.]
L. R. Lindsay."

"THE STATE OF ALABAMA, } Personally appeared be-
DALLAS COUNTY. } fore me, Isam Gwinn, an acting justice of the peace in and for said county, John Walker, who acknowledged that he signed and delivered the foregoing deed on the day and date therein dated, and for the purposes therein mentioned. October 16, 1847. ISAM GWIN, J. P."

On this application, it being made known to the court that some of the heirs and legatees of the said decedent were non-residents, it was ordered that publication be made for six weeks, in the "Dallas Gazette," a paper printed and published in the town of Cahaba, notifying all persons interested to appear at a given day, and show cause, if any they had, why said paper should not be admitted to probate as the last will and testament of said John Walker, deceased.

This publication was duly made, and on the day appointed the appellant, who is a son of the decedent, appeared, and filed written objections to the paper's being received as the last will and testament of said decedent. These objections are as follows:

"1. That the said paper or instrument of writing, now offered for probate, is not the last will and testament of the said John Walker.

"2. That, at the time said paper or instrument of writing purports to have been executed by said John Walker, to-wit: at the time the same bears date, and before and afterwards, he, the said John Walker, was not of sound and disposing mind and memory.

"3. And that said John Walker was unduly influenced in the execution of said paper.

"Wherefore, for these and divers other good and sufficient causes, the said John G. Walker contests the validity and objects to the probate of the said paper as the last will and testament of said John Walker, deceased, and asks the court that a day may be set, and a jury empanneled for the trial of the same, according to the statute," &c.

Issue was joined on these allegations, and the cause was tried by a jury at a special term of the court, which had been appointed by consent of the parties. On the trial, a bill of exceptions was allowed, from which it appears that the contestant offered as evidence the declarations of the said proponent of the will, as to the mental capacity and condition of the said decedent about the time when the will purports to have been executed; but the evidence was excluded by the court, on the motion of the proponent, and the contestant excepted.

It further appears from the bill of exceptions, that, "after the evidence on both sides was closed, the contestant, by his

counsel, moved to dismiss the application of the proponent, under the issues formed between proponent and contestant, on the ground that the court could not, at that time, hear and give judgment upon the same, because the next of kin of the testator had not been cited in conformity with the statute, no one contesting but the said John G. Walker, who was present, it being shown that some of the heirs at law of the said testator reside in this State, and that forty days' previous notice had been given, in a newspaper published in Cahaba in said county; and also because that was not a stated term of the court.—Which motion the court overruled, and on the latter ground for the reason that the contestant consented to the fixing of that special term; and the contestant excepted."

The errors now assigned are:

1. The court erred as shown by the bill of exceptions;

2. The court erred in excluding evidence of the declarations of the said proponent, as to the decedent's mental condition;

3. In overruling the contestant's motion to dismiss the proponent's application, on the ground that the next of kin of the decedent had not been cited according to the statute;

4. In overruling contestant's motion to dismiss, because the court could not hear and render judgment in the cause at any other than a stated session of the court.

5. In admitting to probate the paper offered as the last will and testament of the decedent, the same appearing on its face to be a deed and not a will.

J. L. Evans, for plaintiff in error:

1. The paper propounded as the last will and testament of the decedent appears on its face to be a deed, and not a will; it should not have been admitted to probate, as a will, without extrinsic proof of the intention of the maker. It is distinctively different from a testamentary conveyance, because it took effect in the decedent's life time, and became absolute and irrevocable.

2. Evidence of the declarations of Jones, the proponent, ought to have been admitted.—8 New Hamp. 351; 9 Watts & Serg. 32; 1 Pike 557. As a general rule, the declarations of a party are good against himself; and in this, Jones pos-

sessed peculiar opportunities of information on the matters in issue. Being the only party plaintiff on the record, his admission could not be held to prejudice the rights of other legatees under the will, as they might be adjudicated in another trial.

3. The notice by publication was not sufficient. The statute requires a personal citation on the next of kin resident in the State, as well as notice by publication to those who are non-residents. It is shown here that several of the children of the deceased reside within this State.—Clay's Digest 303 § 34; 7 Porter 248; 4 Ala. 270.

GEO. W. GAYLE, *contra:*

1. The declarations of the proponent were properly excluded.—Roberts v. Trawick, 13 Ala. 68.

2. The court properly overruled the contestant's motion to dismiss the proceedings on the ground that the next of kin had not been cited according to the statute. The contestant had no right to claim notice to any but himself; this he had, and appeared and contested. The record shows that notice by publication was given. Some were non-residents, but they were not required to have notice.—Roy v. Seagrist, 19 Ala. 810; Lee v. Browning, 15 Ala. 496; Shields v. Alston, 4 Ala. 252.

3. The other ground on which the motion to dismiss was predicated, viz., that the court could not hear and render judgment in the cause at any other than a regular term of the court, was equally untenable, because the record shows that the day of trial was agreed on by the parties, and because the judge has a right to direct the time.—Clay's Digest 304 § 35; *ib.* 363 § 6.

4. The instrument propounded is a will, though called a deed.—2 Ala. 152; 6 Ala. 636; 19 Ala. 59.

GIBBONS, J.—It is assigned for error that the court below rejected the proof of the declarations of Jones, (the appellee and proponent of the will,) tending to show that the testator was of unsound mind at the time the will was made. It will be observed that Jones, the proponent of the will, is the husband of one of the legatees under it. He holds, therefore, the same relation to the contestant, so far as the principle involved is concerned, as if he were directly a legatee. The question then arises, can the declarations of one of several legatees under a

will be received in evidence to impeach its validity on an issue involving the question whether the will is or is not valid. This question is answered by a previous adjudication of this court in the case of Roberts v. Trawick, 13 Ala. 68. Chilton, J. remarks in this case: "We feel safe in declaring the correct rule to be, that when a will is propounded to the Orphans' Court for probate, and is there contested, the admissions or declarations by one of several legatees of the unsoundness of the testator's mind, or that fraud, imposition or undue influence was practiced upon or exercised over him, shall not be received to invalidate the will to the prejudice of the other legatees;" citing Dan v. Brown, 4 Cow. R. 483. This is entirely decisive of the question, and shows that the court committed no error in excluding the declarations of Jones.

Again; it is assigned for error, that the court refused to dismiss the proceedings on the motion of the contestant. This motion was predicated upon two grounds: 1st, that the heirs or next of kin of the testator, residing in the State of Alabama, had not been notified; and 2d, that the court could not hear and decide the cause at any other than a regular term of the court.

It is undoubtedly true, that the statute requires the heirs at law or next of kin of the deceased to be cited by a personal notice when a will is offered for probate, if the proponent of it would conclude the rights of those who have an interest in contesting the will, by the judgment admitting the same to probate.—Clay's Digest 303 § 34; Shields v. Alston, 4 Ala. 252; Lee v. Browning, 15 Ala. 496; Roy v. Seagrist *et al.*, 19 Ala. 810. The present record does not show any notice whatever to the heirs at law, other than that of publication; and the question now arises, whether John G. Walker, one of the heirs who appeared and contested the will, can be heard to assign for error that which does not affect him, but which affects only the other heirs? The present record does not disclose who are the heirs at law, or where they reside, except that some of them are nonresidents, and some reside within the limits of the State; but who they are that reside within the limits of the State, is not shown.

It is doubtless the right of each and every heir at law of the testator, whose will is propounded for probate, to appear and

contest the same; but this right is one which each heir possesses individually for himself, and which he exercises for himself alone. We do not think it necessarily follows, where there are several heirs, that one cannot exercise this right, and thus bar himself by the decree, without the others joining in the contest. If he can do so, then, it is not for him, after a trial had in which he has appeared and tried his interest in the will, to set aside the judgment and annul the decree, by suggesting that there are other heirs who were not before the court. The proponent of the will, who proceeds in this manner, does so at his peril, as he is liable to have as many trials as there are heirs at law. A decree admitting a will to probate, without having resident heirs before the court by process served upon them or their guardian, most surely cannot conclude their rights, and as often as any one of them appears before the court and makes himself a party to the record, he can reverse the decree in this court.

Such a course of proceeding would doubtless be impolitic both for the court and the proponent; but we see nothing illegal in it, as we are clear that the court has jurisdiction of the subject matter, and may try the question with any number of the heirs less than the whole before it; or it may stay its proceedings until they are brought in, and then try the question so as to bind all. The court, then, having jurisdiction to try the question with any one of the heirs before it, it follows as a necessary consequence, that one heir could not assign for error the absence of another heir in the trial of the issues which were to establish or bar his rights in the premises. There was, therefore, no error in refusing to dismiss the cause because the resident heirs were not brought before the court. These heirs may acquiesce in the will, for aught this court can know; at all events we can only interpose to protect their interests, when they present themselves before us, and demand our aid.

It cannot avail the appellant on error that the issues were tried at a time other than the regular term, as the record shows that it was by his consent that the time at which the trial was had was named. He is therefore estopped from objecting to its legality. There was, therefore, no error in not dismissing the cause for either of the reasons alleged.

It is further insisted in argument that the instrument offered as a will was illegally probated, because it is in fact a deed, and

not a will. We think otherwise. We think it is apparent from the instrument, when taken as a whole, that it was intended as a will, and not as a deed. It is true it is called by the testator a deed, but the whole structure of the instrument, and the legal effect of the language employed, show that it was intended as a disposition of the property of the testator by bequest, a donation *causa mortis*, and not by deed *inter vivos*. Under such circumstances, it matters not what the instrument is called by the author, as it is the intention apparent upon the face of it that must give it its real character. In the present case, we have no hesitation in arriving at the conclusion that the instrument propounded was a will, and not a deed.

It follows there is no error in the record, and the judgment of the court below is affirmed.

HOYT, FORD & ROBINSON *vs.* MURPHY.

1. In assumpsit, some of the plaintiff's claims having been excluded from the jury under the charge of the court, plaintiff moved for a new trial; whereupon it was ordered "that a new trial be granted, unless the defendants enter into an agreement of record, that upon any future settlement in chancery, or bill filed for an account between said parties, or any transaction between said defendants and H. & F., the said defendants will not plead the verdict and judgment in said cause, or use the same in any manner to bar the claim of said plaintiffs or said H. & F. for an account and settlement in relation to" said excluded claims, "all of which were included in the account produced and read to the jury by the plaintiffs on the trial; and thereupon came said defendants by attorney, and covenant and agree to the above terms imposed by the court, and it is thereupon considered by the court that the said motion for a new trial be overruled: *Held*, that the effect of this order and agreement was to exempt the excluded claims from the effect of the judgment, and that plaintiffs might use them as a set-off in an action at law subsequently brought against them by defendant
2. When one partner takes a bond from his co-partner on the dissolution of the partnership, conditioned that the obligor shall pay all the debts of the firm, and the latter afterwards brings a suit at law, the obligee is an incompetent witness for the defendant to prove that a debt offered as a set-off "was due from said firm at the time of its dissolution, and that it was acknowledged to be due; also to prove the amount of the debt, and what it was for."

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. JOHN A. CUTHBERT.

THIS was an action of ASSUMPSIT by Murphy against Hoyt, Ford & Robinson, to recover upon an account for goods sold, moneys advanced, &c.

The defendants below admitted the account sued on, but pleaded, by way of set-off, that the plaintiff was indebted to them in a larger amount, which they offered to have extinguished to the extent of the plaintiff's demand.

The demands sought to be set-off consisted of payments made by the firm of Hoyt, Ford & Robinson for Murphy & Brack.

It appeared that Hoyt, Ford & Robinson had previously instituted suit against Murphy & Brack, on the same claims now offered to be set-off with other demands, in the Montgomery County Court, and had recovered a judgment in said County Court for about the sum of the demands embraced in the suit exclusive of these now offered as a set-off; and these claims having been excluded by the jury under the charge of the court, the plaintiffs in that action moved for a new trial. Thereupon the following agreement was entered of record in the cause:

"On the application of the plaintiff's attorney for a new trial in this cause, it is ordered that a new trial be granted, unless defendants enter into an agreement of record, that upon any future settlement in chancery, or bill filed for an account between said parties, or between the owners of the steamboat Formosa, or any transaction between said defendants and Waite S. Hoyt and Clinton Ford, the said defendants will not plead the verdict and judgment in said cause, or use the same in any manner to bar the claim of said plaintiff or Waite S. Hoyt and Clinton Ford, for an account and settlement in relation to a draft," &c., (here follows a description of the claims now urged as valid sets-off,) "all of which were included in the account produced and read to the jury by the plaintiffs on the trial; and thereupon came said defendants by attorney, and covenant and agree to the above terms imposed by the court, and it is thereupon considered by the court that the said motion for a new trial be overruled."

Upon the trial in this case, the plaintiff, Murphy, insisted that the former judgment in the County Court of Montgomery was

a bar, while the defendants contended that their sets-off should not be affected by that judgment by reason of the foregoing agreement, and they asked the court to charge the jury, "that the true construction and legal effect of the agreement and condition made in refusing a new trial in Montgomery, would relieve the defendants from said bar." This the court refused, and charged "that by the construction of said order and its legal effect, the claim might be opened in a court of chancery, but that it did not apply to a court of law, and would not avoid the bar in a suit at law." This charge was excepted to by the defendants.

The defendants having proved the partnership between Murphy & Brack, and that they had dissolved, and that Brack had taken a bond from Murphy conditioned that Murphy should pay all the debts of the firm of Murphy & Brack, offered Brack as a witness, not generally, but to prove that the debts were due to the defendants by the firm of Murphy & Brack; but the court excluded Brack, and the defendants excepted.

These matters which, among other things not necessary to be stated, appear by a bill of exceptions, constitute the subject matter for revision in this court.

Geo. N. Stewart, for appellants:

1. The decision of the court in the first case was erroneous, because Hoyt, Ford & Robinson were not even alleged to be partners in the transaction. They had paid money for account of all the partners, at the special request of Murphy & Brack, and were entitled to recover of them on that demand, at law, for money paid for them and at their request, although even Hoyt & Ford might have been partners.

2. That the grant of a new trial, "unless" &c., was an admission that the instruction or the finding of the jury was wrong, and the condition was intended to leave the claim open to be recovered in any proper action in which it might be recoverable.

3. It was admitted that the claim was a just one to be recovered in a proper form of action. Its merits not being questioned or denied, it cannot be barred in any action proper for its recovery.

4. The true object of the agreement was, that the claim should

not be barred, and it should be so construed. Hoyt, Ford & Robinson have no claim which they could assert in a court of chancery; their demand is legal, and they are expressly named in the agreement to be protected. To say that they may only use it in a court of equity, where they can never go, would make the agreement nugatory, and put a construction on it which the court never intended.

5. If Brack was not competent to prove the whole case, and particularly the partnership and its dissolution and Murphy's obligation to pay the firm debts, he was certainly competent, these facts being proved to the satisfaction of the court by evidence *aliunde*, to prove the debt against Murphy. On this point there is no conflict of authority, though there is as to his competency to prove the fact of partnership.—Collyer on Partnership; 20 Ala. 296; 13 S. & M.; 10 Missouri 578.

6. The former verdict was no bar, because it was on matter of abatement; it was not on the merits, and does not stand in full force.—21 Pick. 253; 4 *ib.* 230; 6 Durn. & E. 275, 608; 4 *ib.* 80, 147; 47 Law Library 105, 129; 21 *ib.* 95; 1 Chitty's Pleading 198, 477; 10 Peters 298; 6 Wend. 288; 2 Marsh. 306, 354.

Chandler & Smith, *contra:*

1. Brack was an incompetent witness, and was so held by this court in 18 Ala. 316.—See also 17 Ala. 62. The effect of his testimony was, to make another man pay his debts.

2. But if there was error in ruling him incompetent, it was error without injury, as the bill of exceptions shows that the facts which he was offered to prove were not only established by the testimony of other witnesses, but were not disputed, and the case was decided upon another point.—21 Ala. 38; 19 *ib.* 63; 8 *ib.* 736, 522, 963; 4 *ib.* 230; 7 *ib.* 162.

3. Was the former recovery, in the case of Hoyt, Ford & Robinson v. Murphy & Brack, conclusive in this case? That judgment was given in evidence under the general issue; the claim relied on by the defendants in this case went to the jury in that case, and was passed on by the court. Whether the jury allowed or rejected the claim, that judgment is conclusive on the parties until reversed. If the court was wrong in its charge on the former trial, the defendants had an opportunity to

correct the error.—3 Phil. Ev. 804, note 558; 6 Gill & J. 346, 355; 2 Wash. 65; 3 Cowen 120; 4 *ib.* 559.

Again; a judgment of a court having jurisdiction is not only final and conclusive as to the matter actually determined, but as to every other matter which the parties might litigate in the cause.—3 Phil. Ev. 828 to 831; 1 Johns. Cas. 436, 501. In all cases, where the judgment is rendered on the merits, it is a bar to another action between the same parties. The test of conclusiveness is, was the judgment upon the merits.—Phil. Ev. 835; 1 Mason 515, 519.

The agreement was properly construed by the court below. It is confined to a "future settlement in chancery, or bill filed for an account between the parties, or between the owners of the steamboat Formosa, or any transaction between Murphy and Hoyt & Ford." In such proceedings, for the adjustment of partnership transactions, Murphy bound himself not to plead the verdict and judgment in said cause, or use the same in any manner to bar the claim of the said Hoyt, Ford & Robinson or Hoyt & Ford, for an account and settlement," &c. If the judgment was to be no protection at all to Murphy, either in law or equity, why should he have acceded to the terms imposed by the court? What advantage would he have derived? The object in making the agreement is manifest: the charge of the court was correct, and no exception was taken to it; the verdict was also correct, for the evidence showed that it was a partnership debt, and unsettled; but plaintiffs were apprehensive that, if they went into chancery, this judgment would be pleaded against them there, and they therefore asked a new trial. If a new trial had been granted unconditionally, the partnership items would have been omitted on the next trial, and a bill would have been filed before the trial to settle the partnership claims. The court then accommodated the plaintiffs by confining the use of the judgment to an action at law, and preventing its use in any chancery proceeding. That matters once investigated in a court of law cannot be heard in chancery, is a principle well settled.—1 Dana 435; 3 Phil. Ev. 829, note 588; 17 S. & R. 325; 1 Johns. Cas. 436.

CHILTON, C. J.—The object of the agreement required to be entered into by the judge of the County Court of Mont-

gomery County was, to exempt the claims now insisted on from the influence of the verdict and judgment rendered in that case. The plaintiffs in that court had sued upon them, and the jury, under the ruling of the judge, had rejected them; and, but for the agreement, it was supposed that this judgment would constitute an effectual bar to their subsequent recovery.

It is true, the court seemed to be of opinion that the claims so rejected under the decision could only be recoverable in equity; but it was not the object to deny to the parties the right of recovery upon them, should it turn out the court was mistaken. Indeed, there was stronger reason for reserving this right to them in that event, as this erroneous decision had most probably prevented a recovery in the County Court.

We think it may well admit of question, whether the letter of the agreement does not exempt these claims, when asserted in any proper forum, from the influence of the former judgment. It is not to be used as a bar "in any future settlement in chancery, or bill filed for an account between said parties, or between the owners of the steamboat Formosa, or any transaction between said defendants and W. S. Hoyt and Clinton Ford, or used or pleaded in any manner to bar the claim of said plaintiffs or Waite S. Hoyt and Clinton Ford, for an account and settlement in relation to said claims," &c. If the bar was to be effectual every where else except in chancery, then a large portion of the agreement is redundant and unmeaning.

But conceding that the construction which we place upon it is not in strict accordance with the letter, we feel satisfied that it conforms to the intent and spirit of the order. We cannot suppose that the court intended to trifle with the rights of the plaintiffs; on the contrary, the fact that such an order was made, was a concession on the part of the court that the parties plaintiff had rights which would be injuriously affected by the judgment as it then stood, and it was for their protection that the order was made. Now, to place upon it such construction as would make the court virtually say to the plaintiffs, 'True, you have rights which I am disposed to protect from the influence of this judgment, and it shall not be pleaded or used as a bar in any manner against you, provided you assert the claims in a court of equity, *which has no jurisdiction to afford you relief;* but as to all other courts which *may take cognizance* of

such demands, this judgment shall remain an effectual bar,' would be to make the court the minister of palpable injustice, and to render the order nugatory and worthless. It is, however, our duty to give the order such construction as will make it avail, and as will effect the obvious design of the judge who required it to be made, and such as will not place him in the odious position of tantalizing the plaintiffs by an admission and yet a denial of their rights, a position which we are sure cannot with any propriety be assigned him.

But, it is asked, what motives could Murphy & Brack have had in consenting to the terms of the order thus understood? They may have had very substantial reasons for preferring the conditions imposed by the court to opening the judgment for a new trial. Other matters besides these now in litigation were concluded by that judgment, and these would have been re-opened. Be this, however, as it may, it is certain they gained time by acceding to the order, and this may have constituted a sufficient inducement.

2. We think the witness Brack was an incompetent witness. The party offering him concedes that he (the witness) is bound for the demands, and the object was to prove that Murphy was bound with him; in other words, that the debt claimed "was due from the firm of Murphy & Brack at the time of the dissolution of that firm, and that it was acknowledged to be due; also to prove the amount of the debt, and what it was for."

If Brack was bound for it, he was interested directly in proving it to be a partnership demand; for, in that event, he not only made Murphy liable also, but, by virtue of the agreement between him and Murphy, by which the latter bound himself to pay all the partnership debts, Murphy would have to pay the whole, and thus the demand would be extinguished as to Brack. We see nothing in the facts of the case as now presented which takes it, upon this point, without the influence of the previous decision of it in 18 Ala. R. 320; see also Aston v. Jemison, 17 Ala. R. 62, and cases there cited.

Let the judgment be reversed, and the cause remanded.

BARNETT'S EXECUTOR *vs.* TARRENCE.

1. Where the record shows an irregular final settlement of an estate, the court will presume in favor of its correctness, after the lapse of twenty years, that the necessary notices were given, and that the parties in interest were present.
2. Where the parties in interest appear, and consent to the postponement of the settlement, they cannot afterwards be heard to complain of any irregularity in the manner of bringing them in.
3. Where the slaves returned in the executor's inventory as belonging to the estate are divided by commissioners, under an order of the Orphans' Court, among the distributees, and after the lapse of twenty years one of the distributees attempts to charge the executor with the value of other slaves not included in the inventory, and shows no excuse for his delay, his claim cannot be asserted or allowed in the Orphans' Court.

ERROR to the Court of Probate of Dallas.

David Barnett died in the year 1828, and his will was admitted to probate at the September term, 1828, of the Orphans' Court of Dallas County, by which he appointed William Barnett and James Olds his executors, to whom letters testamentary were granted at the same term.

The will provides that the estate shall be kept together for the use of the widow until the 1st day of January, 1830, and at that time should be distributed among the testator's widow and heirs at law, according to the laws of distribution of this State.

The executors proceeded to pay all the debts of the estate, and, as appears by the record, procured an order at the December term, 1828, for a distribution of the slaves; and commissioners were appointed to make distribution as directed by the will, who reported their proceedings to the March term, 1829. This report was received, confirmed, and ordered to be recorded by the court.

At the January term, 1832, the executors applied for and obtained an order to make final settlement, and, after being continued until the 12th June, 1832, a settlement was made, which the judge orders to be received and admitted to record as a final settlement.

On the 17th of September, 1851, on the application of one Wm. H. Tarrence, whose connection with and interest in the estate are nowhere shown by the record, a citation was issued to William Barnett, surviving executor of David Barnett, deceased, requiring him to appear and show cause why he should not make a final settlement of the estate of his testator. After several continuances, and sundry orders to compel his appearance, he came into court at the March term, 1852, where by an order of the court the proceedings against him were dismissed at the costs of the petitioner.

At the May term, 1852, another citation was issued against the surviving executor, to show cause why he should not make final settlement, and on his not appearing to this citation the court proceeded to state an account *ex parte*, and issued a notice to the executor requiring him to come forward and show cause why the account so stated should not be reported and allowed as a final settlement of the testator's estate. To this notice the executor appeared, and at the November term, 1852, pleaded the former settlement, *nul tiel record*, and some other plea which the record does not sufficiently disclose to be understood; all the issues, however, were decided against the executor, and a judgment rendered against him for $3042 25. This sum is said to be the value of two slaves, Harriet and Nelly, claimed and held by James Olds, one of the executors, as his own property, with interest on that value from the 1st day of January, 1830.

Under the view taken of this case by the court it is unnecessary to set out the proof found in the record concerning the title of these slaves; it is sufficient to say that they were never returned by the executors in their inventory as a part of the estate of their testator, but were claimed and held by Olds as his own property, he having possession of them at the testator's death.

Olds died before Tarrence commenced this proceeding, but at what time does not appear.

It is here assigned for error:

1. That the court below disregarded the final settlement of 1832, and proceeded to render a decree at the November term, 1852.

2. That the court below erred, in rendering a decree against the executor on the proof before it.

3. That the court erred, in charging the executor with the value and hire of the slaves Harriet and Nelly.

George W. Gayle, for plaintiff in error:

1. There was a final settlement of this estate in the year 1832; and there has been no reversal of that decree, no disturbance of it by bill in chancery or otherwise. Therefore, the Probate Court had no jurisdiction to disturb in November, 1852. As to what is a final settlement, see Andrews v. Hall, 15 Ala. 85.

2. After an executor's account has been audited and allowed, and forty days' notice given, the account cannot be re-examined on final settlement, unless it is objected to within forty days. —Horn v. Grayson, 7 Porter 207; Taylor v. Reese, 4 Ala. 121; Lampkin v. Heyer, 19 Ala. 228; Fitzpatrick v. Hill, 9 Ala. 783; Slatter v. Glover, 14 Ala. 650.

3. If error occurs in a settlement, it can only be reached by error to the Supreme Court, unless fraud is alleged in equity. —6 Porter 219, and cases above cited.

4. The slaves decreed to be accounted for, were a gift from David Barnett to Olds and wife, as shown by proof.—Hill v. Duke, 6 Ala. 259; Olds v. Powell, 7 Ala. 655. This position is taken, if the Probate Court had jurisdiction after the settlement in 1832.

5. If the slaves Harriet and Nelly were not a gift, then Olds held six years' adverse possession of them, and this gave him a title, even if he held under a loan.—Pool v. Harrison, 16 Ala.

George W. Stone, *contra:*

1. There had been no final settlement in this case; that which is relied on as a settlement, wants many of the essential requisites.—Horn v. Grayson, 7 Porter 270; Taylor and Wife v. Reese, 4 Ala. 121; Douthit v. Douthit, 1 Ala. 594; Ashley v. Ashley, 15 Ala. 15; Willis v. Willis, 16 Ala. 652.

2. Joint executors are regarded as an individual; when they execute a joint bond, they are severally liable for the acts of each other, and the sureties for the whole.—1 Lomax on Executors 333; Harrison and Wife v. Williams, 19 Ala. 277; Little v. Knox, 15 Ala. 576.

3. Permitting Olds, co-executor in this case, to retain the

slaves Harriet and Nelly, was a *devastavit* by both executors.—2 Lomax on Executors 288, 289; Quick and Wife v. Stains, 2 Esp. 657; S. C., 1 Bos. & Pul. 293; Hughes v. Mitchell, 19 Ala. 268, 271.

4. The possession of Olds, being acquired by permission, never became adverse. Moreover, he being executor, his possession will be referred to his right as such. An executor or trustee can never hold adversely to the legatee or *cestui que trust*, until after a regular and legal final settlement.—Strong v. Strong, 6 Ala. 345; Cole v. Hebb, 7 Gill & Johns. 20; Whaley v. Whaley, 1 Spear's R. 225; Smoot v. Watkins, 8 Missouri 522; Alden and Wife v. Gilmore, 13 Maine (1 Shep.) 178; 12 Vermont 205; Moore v. Johnson, 2 Spears' Reports 288.

5. On the facts of the case, see the statement of facts in Cole v. Hebb and Smoot v. Watkins, *supra*.

LIGON, J.—The final settlement of the estate of David Barnett, deceased, made in June, 1832, does not appear to have been in any manner questioned in the court below on the trial from which this writ of error is prosecuted, or, in other words, it does not appear that the fairness of that settlement, as to the assets of the estate embraced in it, was denied; its character as a final settlement of the whole estate of the testator was alone put in issue.

It is true the record does not show that the parties in interest were all brought in as the statute requires, or that the notices were regularly served, or that publication was made according to the order of the court made at the January term, 1832, appointing the second Monday in April, 1832, as the time when such final settlement should be made. But at that term of the court, it appears by the record, an entry was made in these words: "This being the day set apart for the final settlement of David Barnett, deceased, came the executors of said estate, and by consent said final settlement is postponed until the Tuesday after the second Monday in May next."

After so great a lapse of time as has intervened between the making of the order for final settlement in this case, and the time at which the defendant in error exhibited his petition for citation against the surviving executor, requiring him to make

final settlement, (a period of more than twenty years,) this court will presume, in favor of the correctness of that settlement, that the necessary notices were given, and that the parties in interest were present, consenting to the continuance. If they appear and are consenting to the action of the court in one part of the proceeding, they cannot afterwards be heard to complain of any irregularity in the manner of bringing them in. In such case, the court acquires jurisdiction of the persons by such voluntary appearance, and may well proceed to judgment or decree in the cause. A decree rendered under such circumstances is binding on the parties to it, until it is reversed in the proper court; and the court rendering it has no power to review or annul it.

In this case, the Orphans' Court proceeded, on the application of the executors above referred to, to audit, state, and settle their accounts with the estate of their testator, and finding that a balance of $385 50 was due to one of the legatees, rendered a decree in her favor against the executors for that sum; and the account, thus stated, was ordered to be recorded, and the order further proceeds, "and that said account current be received, and the vouchers filed, and that thence the said estate be finally settled."

The executors cannot now be called upon in the Probate Court to go into a settlement again, when all parties have reposed upon that already made for so long a period that it is fair to presume, that much of the proof which was then attainable could not now be commanded, and, in all probability, injustice would be the result.

2. In the case of Rhodes v. Turner and Wife, 21 Ala. 210, it is said, "If a final judgment had been rendered, according to the principles of the common law, it would be presumed to have been paid after the expiration of twenty years; and if the parties allow this period to elapse without taking any steps to compel a settlement, we think the presumption of payment arises, and the executor or administrator should be exempted from the necessity of hunting up evidence to prove the accounts and vouchers which ordinarily enter such settlements, and which, after such a lapse of time, it would perhaps be impossible to obtain. This period of twenty years, we apprehend, would date from the time when the administrator or executor

might have been called to a final settlement of the estate."

We have carefully examined the grounds on which the rule here suggested is founded, and are thoroughly convinced its adoption is essential to the safety and repose of executors, administrators and guardians, and to the advancement of the ends of common justice. It is strictly analogous to the rule at common law in relation to judgments, and more liberal than the rule in equity with respect to stale claims.

Let us apply it to the present case, so far as it relates to the slaves Harriet and Nelly, whose value, and interest on that value, form the sole basis of the decree of the court below.

The slaves of the estate, so far as the executors make any return of them in their inventory, were divided by commissioners, by virtue of an order of the Orphans' Court, among the parties in interest under the will of David Barnett, deceased, on the 27th of December, 1828, and we may presume that each party went into possession of his portion. The names of the slaves in controversy do not appear in the inventory, or in the list of those allotted to the several legatees. In fact, nothing is ever said of them in the record, until proof is introduced on the trial of the issue at the November term, 1852. By the will of David Barnett, the estate was subject to division on the first day of January, 1830, and from some cause, not stated in the record, the slaves were actually divided in the year 1828.—Thus, nearly twenty-two years are permitted to elapse before any attempt is made to charge the executors with these slaves. A claim so stale, and unaccompanied by any proof which will tend to account for the delay in asserting it, cannot be asserted or allowed in the Orphans' Court.

The attempt made by the defendant in error to bring about a final settlement of the estate of David Barnett, deceased, in the year 1851, in which his petition was dismissed by the court at his cost, so soon as the surviving executor appeared, cannot aid his claim. This too, was made after the expiration of twenty years, from the time fixed by the will for the distribution of the property, and at which such distribution, as well as a final settlement, could have been coerced.

Let the decree be reversed, and the cause remanded.

OTIS & JAYNE *vs.* THOM.

1. In an action against the owners of a steamboat to recover damages for the loss of a stage, occasioned by a collision between the steamboat and a ferry flat on board of which the stage was, evidence that the ferryman of the flat was expert and careful is irrelevant to the issue, and therefore inadmissible for the plaintiff.
2. In such action, the statement of a witness who saw the collision, "that he thought, had the steamboat returned to the assistance of the flat when the call for assistance was made, the stage could have been saved," is mere matter of opinion, and therefore inadmissible.
3. A witness who saw the collision testified that, after the steamboat struck the flat, she stopped her engine, and when about fifty yards from the flat she was called upon by those on board of the latter to come to their assistance; whereupon, some one on board the steamboat was heard to say, in a loud and commanding tone, "Go ahead, and let her sink; it's nothing but a damned flat-boat, any how"; and the steamboat then went on, without rendering any assistance to the flat: *Held*, that the words stated as being used on board of the boat were admissible evidence for plaintiff.
4. In an action against the owners of a steamboat to recover damages for the loss of a stage, occasioned by a collision between the steamboat and a ferry flat on board of which the stage was, the stage-driver, under whose care and control the stage was at the time, is an incompetent witness for the plaintiff, without a release.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. LYMAN GIBBONS.

THIS action was brought by Reuben Thom, the defendant in error, against the owners of the steamboat Lowndes, who are the plaintiffs in error, to recover damages for the loss of a stage, occasioned by a collision between the steamboat and the ferry flat on board of which the stage was.

On the trial, a witness for the plaintiff stated, that he had known the ferryman of the flat for fifteen years, and that he believed him to be an expert and careful ferryman. The defendants objected to this evidence, on the ground that it was matter of opinion only, and because it was irrelevant; but the court overruled both of the objections, and defendants excepted.

The same witness also testified, that, after the collision, the

steamboat stopped her engine, and when about fifty yards from the flat she was called on, by those on board of the flat, to come to their assistance; that upon this call being made, some one on board of the steamboat was heard to say, in a loud and commanding tone, "Go ahead, and let her sink; it's nothing but a damned flat-boat, any how"; and that the steamboat then went on, without rendering any assistance to the flat. The words above stated, as being heard used by some one on the boat, were objected to by defendants; but their objection was overruled, and they excepted.

The same witness, after stating the circumstances under which the collision took place, also stated, that he thought, if the steamboat had returned to the flat when the call for assistance was made, the stage might have been saved. This evidence also was objected to by the defendants; their objection was overruled, and they excepted.

The plaintiff also introduced a witness, who stated, on his *voir dire*, that he was in the employment of the plaintiff, at the time and place of the collision, as the driver of the stage, and as such had the control and management of it; that the plaintiff was not present at the collision; that, before putting the stage on the flat, he asked the ferryman, who was a negro, whether it would not be better to wait until the steamboat, which was then heard approaching from below, had passed; to which the ferryman replied, that the boat had rung her bell to stop at the lower landing, and that they would have time to get across before she came up; that thereupon the stage was put on the flat by witness, and the ferryman started at once across the river. The defendants then objected to the competency of this witness, on the ground of interest; but their objection was overruled, and they excepted.

These several rulings of the court upon the evidence are here assigned for error.

John T. Taylor, for plaintiffs in error:

1. The opinion of witnesses ought not to have been given to the jury as evidence.—4 Ala. 46; 10 *ib.* 461.

2. The witnesses were permitted to state to the jury, that, after the collision had taken place, some one on board of the boat was heard to say, "Go ahead, and let her sink; it's noth-

ing but a damned old flat-boat, any how." There was not a particle of evidence going to show that this expression was used by any one in authority on board of the boat; there is much more probability that it was used by a negro, or an intoxicated passenger.

3. The witness Sanders was clearly incompetent, on the ground of interest.—1 Green. Ev. §§ 394, 396, 564; 1 McL. R. 540, note.

Wm. G. Jones, *contra:*

1. The general rule, that a witness must testify to facts, and not merely to his belief or opinion, is not disputed. But to this rule there are many necessary and well established exceptions; and it is often difficult to say what is fact, and what is opinion or belief. Thus, testimony as to handwriting, as to personal identity, as to the value of property, and various other matters, must, from the nature of the case, be matter of opinion to a greater or less extent; so, too, all testimony as to character, or skilfulness, must, from the nature of the case, be more or less matter of opinion. In all such cases, such evidence is admissible.—1 Green. Ev. § § 488, 490; 1 Phil. Ev. 227; 2 Stark. Ev. 368. In this case, the character of the ferryman for carefulness, experience and skill, was obviously material; and the witnesses who had known and observed his acts as ferryman for years, were competent to prove it. That was their evidence, and nothing more. The court should not (especially as the depositions were taken on notice, and not objected to,) seize on the expression "I believe," to prevent the true import and effect of the evidence.—See, especially the case of The Commonwealth v. Thompson, 3 Dana 301, where, in a question of solvency, the expression "I considered him good," was held unobjectionable; see also Gentry v. McMinnis, 3 Dana 383; McKee v. Nelson, 4 Cowen 355; 16 Ala. 778.

2. The witnesses here state the facts and reasons of their opinion or belief; and in cases where the main fact to be proved, is a deduction from other facts observed, this seems allowable.—See cases before cited.

3. For the same reasons, the statement of the witness, that the steamer could have saved the flat from sinking after the collision, was properly admitted. It was not mere opinion; he

was an eye witness of the occurrence, and details the facts.

4. The witness Sanders was clearly competent. He was but the agent of Thom; and the general rule is, that an agent is competent to testify for his principal. There is no showing of any liability on his part, or negligence. The verdict and judgment in this case could be no evidence for or against him.

GODTHWAITE, J.—It may be doubtful whether the objection to that portion of the testimony of the witness which gave his opinion as to the ferryman of the flat being expert and careful can be sustained, on the ground that such evidence was matter of opinion merely. It is, however, unnecessary to decide this question, as the record shows that it was also objected to on the ground of irrelevancy, and on this ground the objection should have been sustained. The only issue involved was, whether the collision took place through the fault of the steamboat. If this was established, the owners were responsible; and the fact as to whether the ferryman was expert and careful, could not, of itself, have created any legitimate inference against the boat, and was for that reason foreign to the issue.

We think, also, that the court erred in admitting the statement of the witnesses, "that they thought, had the steamboat returned to the assistance of the flat when the call for assistance was made, the stage could have been saved." This was mere matter of opinion, and given by the witnesses as such, upon the facts which were stated by them. There was nothing to take it out of the general rule in relation to this kind of testimony, and the objection to it should have been sustained.

The words which were detailed by the witness as having been heard on board of the steamboat, taken in connection with the manner in which they were spoken, the fact that the engine had stopped immediately after the collision, and the fact that the boat went on as soon as the words were spoken, might well authorize the jury to infer that an order was given to the effect which was indicated by the words themselves; and in that aspect, they might be received to show that the steamboat, after being apprized of the collision, went on, without any effort to render assistance, which is always regarded in the courts of admiralty as a suspicious circumstance.—Angell on Carriers § 671; The Celt, 3 Hagg. Ec. R. 321.

The only remaining question is, as to the competency of the witness Sanders. The action, it is to be remembered, was brought to recover for the loss of the stage while it was under the care and custody of this witness. If a verdict should be had by the plaintiff in the present action, the witness is placed in a state of security against any action which the plaintiff might otherwise bring against him, and for that reason is held incompetent in cases like this, without a release.—1 Green. Ev. § 396, and cases there cited.

The judgment is reversed, and the cause remanded.

GIBBONS, J., not sitting.

SANDERS ET AL. *vs.* GODLEY.

1. Property in the hands of a legatee may be subjected by bill in equity to the payment of the testator's debts, if the assets prove otherwise unsufficient.
2. The nominal plaintiff in a judgment at law is not an indispensable party to a bill filed by the person for whose use it was recovered, to obtain satisfaction of it out of property in the hands of the debtor's legatees; the objection that he was a necessary party cannot be raised for the first time in the Appellate Court.
3. When a bill is filed by a creditor to subject to the satisfaction of the testator's debts certain property in the hands of his legatee, to whom it was bequeathed for life with remainder to her children, the remaindermen are necessary parties to the bill.
4. The service of subpoena on the surviving parent of infant defendants, *for them*, is sufficient, whether they are over or under fourteen years of age.
5. When judgment is recovered against an executor on a debt of the testator, and the creditor comes into equity to obtain satisfaction out of property in the hands of legatees, alleging the insolvency of the executor and his sureties at the time of the rendition of judgment and from that time until his death, the administrator of the executor is not a necessary party to the bill.
6. When a creditor comes into equity to obtain satisfaction of his debt out of property in the hands of his debtor's legatees, all the legatees who are made defendants must contribute their proportion to the satisfaction of the debt; a money decree against two of the defendants jointly, to one of whom slaves were bequeathed for life with remainder to her children, who are also defendants to the bill, is erroneous.

The bill in this case was filed in the Chancery Court of Madison; but the Hon. David G. Ligon, who was then the Chancellor of the Northern Division, having been of counsel, it was transferred to Jefferson & Walker, and was heard before the Hon. W. W. Mason. It is brought to this court by writ of error.

The bill was filed by Grandin F. Godley against the plaintiffs in error, to obtain satisfaction of a judgment at law against the executor of John B. Fox, deceased, on a debt of the testator, out of certain property in the hands of the defendants, to whom it was bequeathed by said Fox. It alleges that complainant's judgment at law was rendered at the February term, 1841, of the County Court of Madison, in the name of Horner, Blocker & Co. for the use of complainant, against Robert A. High, as executor of said John B. Fox, on a due bill made by Fox to said Horner, Blocker & Co. in 1836; that the amount of said judgment, at the time of its rendition, was $774 99; that previous to the rendition of this judgment, said Fox had departed this life, having made his last will and testament, which was duly admitted to probate in Morgan County on the 26th June, 1837; that by said will, among other legacies small in amount, he bequeathed the bulk of his property, after payment of his debts, to Mrs. Sarah Sanders and James T. Kimble, two of the plaintiffs in error, and appointed Robert A. High his executor; that the property given to said Kimble was bequeathed to him absolutely, consisting mostly of slaves; that the property bequeathed to Mrs. Sanders, also consisting chiefly of slaves, was limited to her husband as her trustee for her separate use during her life, with remainder to her children; that High took upon himself the executorship, giving bond and security, and soon afterwards delivered to Mrs. Sanders and said Kimble all the slaves bequeathed to them, or the greater part thereof.

The bill further alleges that, at the date of the rendition of complainant's said judgment, said High was wholly insolvent, and had no property either of his own or the testator's that could be reached by execution; that the sureties on his bond as executor were also insolvent at that time, and so continued; that said High continued insolvent until his death; that the other legatees had never received their legacies; that complain-

ant does not know the names of Mrs. Sanders' children, but prays that she may disclose their names, and that they may then be made parties. The prayer of the bill is, that the property in the hands of the legatees may be subjected to the satisfaction of complainant's judgment.

Said Kimble, Mrs. Sanders, and Nathaniel Terry as administrator *de bonis non* of said John B. Fox, are made defendants to the bill; and after Mrs. Sanders had answered, giving the names of her children, the bill was amended so as to make them parties. The subpœna on the amended bill was served on Mrs. Sanders, as mother and surviving parent, in behalf of her children, in July, 1842. Another subpœna was afterwards issued, which was served on the children themselves, except Benton Sanders, in May, 1843. The record does not anywhere disclose the ages of the minors, nor does it show the appointment of a guardian *ad litem* for them except by implication. Notice was issued, among others, to William H. T. Browne, as guardian *ad litem* for the minors, to attend a reference ordered before the master, and he acknowledges service as such on the 16th April, 1846. There is also an answer filed by him, as guardian of all the minors, on the 5th May, 1848, and afterwards an acknowledgment by him of service of notice for the taking of depositions.

All the defendants answered the bill, the minors by their guardian *ad litem*, William H. T. Browne. Mrs. Sanders and Kimble demur for want of equity, for misjoinder of parties, and because complainant's remedy, if any, is at law. The answers and proof fully establish the material allegations of the bill.

At the July term, 1850, the cause was submitted for final decree on the bill, answers, exhibits and proof. The Chancellor held that the complainant was entitled to the relief which he sought, and ordered a reference to the master to ascertain and report to the next term of the court the amount due complainant on his said judgment at law, for principal, interest and costs. At the July term, 1851, the master reported that the principal and interest due on the judgment at law amounted to $1421 86, and that the complainant's solicitor abandoned all claim to the costs of the suit. This report was made on the 21st July, 1851, and was confirmed on the same day. Thereupon the Chancellor decreed "that said Sarah Sanders and James T.

Kimble pay to the complainant the said sum of $1421 86, the sum reported by the master to be due him, with legal interest thereon from the date of the master's report until such payment is made; and in case they fail to make such payment within thirty days from the rising of this court, that then the register issue execution therefor; it is further ordered, that the defendants Sarah Sanders and James T. Kimble pay all cost."

The errors assigned are:

1. In rendering a final decree in the absence of Horner, Blocker & Co., who were necessary parties to the bill;

2. In rendering a final decree without the children of Mrs. Sanders being properly made parties;

3. In rendering a final decree in the absence of R. A. High's administrator, who was a necessary party;

4. In confirming the master's report without requiring it to lie over two days; and in confirming said report, because plaintiffs in error had no notice of the time and place of taking the account on which it is based;

5. In rendering a final decree in favor of complainant without any proof of the indebtedness of John B. Fox;

6. In the rendition of the final decree.

Brickell & Cabaniss, for plaintiffs in error.

D. C. Humphreys and Belser & Rice, *contra*.

PHELAN, J.—We do not understand the plaintiffs in error seriously to question the rule of law, that property in the hands of a legatee will be held liable to the payment of the testator's debts, if the assets otherwise prove insufficient. Even if it be denied, we cannot hesitate to pronounce that such is the rule of law; and the answers and proof in this cause clearly make out a case to which that rule is applicable. The debt against the testator is well established; the insolvency of his executor, and of the executor's sureties, is also well established; and the third fact necessary to complete the right to relief, is just as clear, namely: that Mrs. Sanders and Kimble each received more of the property of Fox from the executor, High, than would be sufficient to pay this debt, and the children of Mrs. Sanders a valuable vested remainder in the slaves bequeathed to their mother.

But it is insisted, that Horner, Blocker & Co., the payees in the due bill which Fox gave, and upon which the judgment for the use of Godley was recovered, in the County Court of Madison, in 1841, should have been made parties complainants, because, it is said, they held the legal title to the due bill, and the party holding the legal title must, as a general rule, be made a party in chancery. That is a general rule, but not a universal one.—Story's Eq. Pl. § 153. But, without discussing that question, it is sufficient to observe here, that the objection to a bill for want of proper parties will not be entertained, if made for the first time in this court, unless the case shows the omission of a party whose connection is indispensable to the just and final decision of the matters in controversy.—Woodward v. Wood, 19 Ala. 215; Dias v. Bouchand, 10 Paige 445. Such is not the case here. The case as presented, so far from showing any interest in Horner, Blocker & Co., goes to show the contrary. Godley seeks satisfaction of a judgment rendered *for his use* against the executor of Fox; the legatees of Fox, who are responsible for its payment under the circumstances, do not deny or in any manner question, in the court below, the sole ownership of Godley; they thereby admit that he is sole owner, and will not be allowed to raise that question here, after letting it pass in silence in the court below.

We agree that the children of Mrs. Sanders were necessary parties defendants to this bill, which sought to subject to sale slaves in the possession of their mother in which they had a vested interest, namely: a remainder after her life estate. But the service of the subpœna on their mother for them was a good service, and they were properly before the court, so as to authorize the appointment of a guardian *ad litem*. The third rule of chancery practice (Clay's Digest 612) says: "Subpœnas issuing against infant defendants may be served upon their parents or either of them, if in life, and, in case of death, upon the general guardian of such infants; and if there is none, then, if the infant is over fourteen years, upon the infant personally, and if under fourteen, then upon such person as may have the maintenance and charge of such infant," &c. This rule means, that, so long as there is a father or mother or general guardian, the service may be upon them, in behalf of infants or minors, whether over or under fourteen years. The subpœnas which

issued and were served on all the infants themselves, except B. Sanders, were, to say the least, unnecessary; the previous service on their mother was good.

The record shows in this case, that the subpœna required the sheriff to summon the infants, naming them, by their mother and surviving parent; and the case of Hodges v. Wise & Wife, 16 Ala. 509, is a decision in favor of the sufficiency of such a service. The case of Johnson v. Hainesworth, 6 Ala. 443, does not show that a subpœna was served on the mother *for the infants;* and, as both were parties defendants to the bill, it was held not to be sufficient that a subpœna had been served on the mother only. The two cases do not conflict, but the language of the court in the latter case, as to the meaning of the third rule of chancery practice, does not agree, as will be observed, with what we conceive to be the true construction.

It was not necessary to make the administrator of High a party, even if there was one. The liability of High could not be increased or diminished by the decree in this case, go as it might. That was fixed by the judgment against him. Besides, he is shown to have been utterly insolvent at the date of the judgment, and to have died so shortly afterwards. If he had made a payment, these defendants could show that, without his administrator being made a party.

But the money decree against Mrs. Sanders and Kimble jointly, for the amount of the judgment, cannot be supported under the facts of this case. If there had been no other legatees, who received property or effects of the testator, parties to the bill, inasmuch as Mrs. Sanders and Kimble were each shown to have received more property than would satisfy the debt, the decree might have been supported, and they left to adjust between themselves the question of contribution. And in such a case, as no reference to the master would have been actually necessary to ascertain the amount for which a decree should be rendered, since the record of the judgment furnished data and proof upon which the chancellor could safely act without the aid of the master, the questions raised as to the report of the master and the confirmation of that report might have been regarded as unimportant. But there is this important feature in the case, which has been entirely overlooked in the decree, and which makes a reference to the master with suitable instructions indis-

pensably necessary to the administration of equal justice in the case: the vested remainder of the children of Mrs. Sanders in the slaves bequeathed to their mother for life, which is a highly valuable interest, must be charged with its proper proportion of this debt. If they were not parties to this bill, and their mother and Kimble should be decreed to pay it, there would be a way open to recover contribution of them; but being parties, the decree of the court must determine and settle, as well what part they are liable to contribute to the payment of the complainant's demand, as that which falls to the share of the other defendants, each being bound in equity to pay in proportion to the value of the testator's property which they respectively received. This is wholly omitted in the decree rendered.

It follows from what has been said, that a reference to the master was indispensable. The master should be instructed to ascertain and report, 1st, the amount of the debt due from the testator, Fox, to the complainant, with interest to the time of taking the account; 2nd, the amount in value of the property of Fox which Kimble received; if slaves, their number and value; 3rd, the amount in value of the property of Fox which Mrs. Sanders, or her husband as her trustee, received; of the slaves, their number and value, and the value of her life interest in them; 4th, the value of the vested remainder to the children of Mrs. Sanders in the slaves which their mother received, and in which she takes by the will of Fox a life estate: the value of all the property and of the remainder to the children of Mrs. Sanders to be estimated as of the time when the property was received by the respective legatees; 5th, to ascertain and state from the foregoing data what portion of complainant's demand each of the respective parties defendants should pay.

Upon the coming in of this report, the chancellor will render a decree in favor of complainant against the respective parties, for their several portions as aforesaid, and allow some short delay for the payment of the same; and shall further decree, that, if the whole amount be not paid by such time, execution may issue against any or either of said parties defendants, to the extent of the property respectively received by them, until the whole is paid.

It follows from what has been said, that the decree below

must be reversed, and the cause remanded, that the chancellor may proceed in conformity with the foregoing views.

LIGON, J., having been of counsel, did not sit in this case.

THOMASON *vs.* ODUM.

1. The act of 1846 allowing several replications to a plea of the statute of limitations, and other pleas therein specified, (Pamphlet Acts 36,) applies to a plea setting up the statute of limitations of another State.
2. The proviso to the statute of limitations of Florida in favor of persons "beyond the seas or out of the country," includes a resident citizen of another State who has never been in Florida.
3. A replication to a plea of the statute of limitations of another State, alleging that the property was converted in this State, and carried into another, where it was purchased by defendant and brought back again, and that it has not been in this State more than four years since the conversion, is bad on demurrer.

APPEAL from the Circuit Court of Conecuh.

Tried before the Hon. ANDREW B. MOORE.

DETINUE by the appellant, Matthew D. Thomason, against Aaron Odum, for a certain negro woman, named Watsey, and her three children.

The defendant, amongst other pleas, pleaded three pleas, in effect as follows: that one Delilah Lawson, in 1839, purchased, in the State of Florida, without notice of the plaintiff's claim, and for a fair and full consideration in money, to-wit: the sum of five hundred and seventy five dollars, of one N. W. Hobson, the said negro woman Watsey, who was then in the possession of the said Hobson, and that the said Mrs. Lawson held the said negro woman adversely to all the world for more than five years, which is the period of the Florida statute of limitations; and that the defendant, after the expiration of the said five years, purchased of the said Mrs. Lawson, and without notice of the plaintiff's claim, the said negro with her children or increase, for the consideration of eight hundred dollars, and has held them up to the time of trial.

To these pleas the plaintiff replied two replications: 1st, that in the statute of limitations of Florida there was a proviso or exception, as follows, to-wit:

"If any person or persons, that is or shall be entitled to any such actions of trespass, detinue, actions of trover, replevin, actions of account, actions of debt, actions for trespass, for assault, menace, battery, wounding or imprisonment, be or shall be, at the time of any such cause of action given or accrued, beyond the seas or out of the country, then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as is before limited, after their coming to or being returned from beyond the seas or from without this country, as by other persons having no such impediment should be done;" and the plaintiff avers that, at the time the said property was converted, he was a resident citizen of the State of Tennessee; that he continued to reside there until the year 1839, when he removed to Alabama, where he has resided until suit was brought, and that he has never been in the State of Florida from the time the action accrued up to the commencement of this suit; that said negro woman was fraudulently and tortiously taken from his possession in Alabama, by one N. W. Hobson in the State of Alabama, and thence taken by him to Florida, and there disposed of to one Delilah Lawson, who retained the possession of said woman and her increase in said State of Florida for a long time, to-wit: until the year 1847, when said slaves were by her placed in the hands of the said defendant, and by him brought back to Alabama for the first time since 1839, when they were so as aforesaid carried by the said Hobson to the State of Florida; and plaintiff avers that, during the whole time, he has been out of the State of Florida.

The second replication is, in effect, that the slave was tortiously and fraudulently taken from the possession of the plaintiff in Alabama by the said Hobson, on the 29th day of June, 1839, and thence carried to the State of Florida and sold to the said Mrs. Lawson, who retained her there until the year 1847, when the slaves were delivered to the defendant, who brought them back to Alabama the year last aforesaid; and the plaintiff further avers that he has never been a citizen of the State of Florida, and that said slaves from the time they were first car-

ried away in 1839 until they were brought back in 1847 have not been in Alabama for the space of four years.

To these replications the defendant demurred, and the demurrers were sustained.

The decision of the court on these demurrers is here assigned for error.

John A. Elmore and J. K. Henry, for appellant:

1. The act of 1846 is general in its terms, and does not restrict the right of filing several replications to the statute of limitations of Alabama. The statute of another State, or lapse of time, is equally within the reason, and therefore within the meaning and terms of the law.

2. But, if the statute does not apply, the objection could not be reached by demurrer, but by motion to strike out. The pleading of several replications is not duplicity, any more than filing several pleas.

3. The first replication brings the plaintiff within the exception of the Florida statute. The terms "beyond seas" and "out of the country," in this country, mean "beyond the jurisdiction of the State."—Angell on Limitations 210; Faw v. Roberdeau's Executor, 3 Cranch 174; 3 Wheat. 341; Bank of Alexandria v. Dyer, 14 Peters 141. Admitting this, however, to be the proper construction of the terms used in the proviso, it is still contended that the exception in the statute has reference only to those who have absented themselves from the State, and does not include those who never were within the State.—This construction is neither warranted by the language of the statute, nor sustained by authority.—State Bank v. Seawell, 18 Ala. 616; Angell on Limitations 214.

4. The second replication raises the question, whether, when property is wrongfully and fraudulently converted in this State, and taken clandestinely into another, and there held for a sufficient length of time to bar a recovery under the statute of limitations of that State, and then brought back into this State, where suit is brought by the owner for its recovery, the wrongdoer can defeat the action by pleading that statute; or, in other words, when the cause of action arises in this State, is not the plaintiff entitled to the benefit of our own statute of six years? or, can our statutes be defeated and annulled, in our own courts,

by the laws of another State, when our courts first acquired jurisdiction? Such is not the course of our decisions.—Bohannon v. Chapman, 13 Ala. 641; Same v. Same, 17 Ala. 696. The cases of Howell v. Hair, 15 Ala. 174, and Jones v. Jones, 18 Ala. 248, do not at all conflict with this position. Considerations of policy, and the principles of international law, sustain the decisions in Bohannon v. Chapman, and show that, when the cause of action accrues in our State, and is sought to be enforced in our courts, our statute must govern it.

WATTS, JUDGE & JACKSON, *contra*:

To show that the court properly sustained the demurrer to the replications, we make the following points, and support them by the authorities cited:

1. More replications than one cannot be replied to the same plea.—Gray v. White, 5 Ala. 490; Stiles v. Lacy, 7 Ala. 17; Vance v. Wells & Co., 8 Ala. 401. The demurrer in this case was general. The statute (Acts of 1846, page 36,) does not relieve these replications from the objection. This statute simply applies to a case when the statute of limitations of our own State is pleaded. In the case at bar, the plea is not in fact a plea of the statute of limitations; it is a plea setting forth facts which give a title to the property sued for.

2. The replications do not answer the pleas. A replication, to be good, must either deny positively the allegations of the plea, or it must confess and avoid by setting up distinct facts. The replications do not deny; neither do they confess the allegations of the pleas; and for this reason the demurrer should have been sustained, if for no other.—Whitehurst v. Bay, 8 Ala. 375; Mason v. Craig, 3 S. & Porter 389.

3. The replications are bad. The defendant acquired a good title to the property, because the person from whom he bought, Mrs. Lawson, had acquired a good title in Florida, by having purchased, *bona fide*, for full consideration, and retained the negroes adversely for more than five years in the State of Florida.—Howell v. Hair, 15 Ala. 194; Newcombe v. Leavett, 22 Ala., decided by Mr. Justice Gibbons at the last term of this court. These cases cover all the points made in this.

4. The replications are bad, admitting the position of the counsel to be true, because they do not negative the idea that the

plaintiff had gone to the State of Florida. The replication simply says, that the plaintiff resided out of the State of Florida, and never has been a citizen of Florida. The proviso to the Florida statute says, after their "coming to or being returned from beyond the seas, or without this country," &c.—The plaintiff must by his replication place himself fully and squarely within the exception to the statute, else his replications are bad. This he has not done.

5. But the argument of the plaintiff in error does not meet the question presented by the record. The record shows the case of one person in Florida, purchasing a negro *bona fide*, on full consideration, without any notice, and retaining that negro as her own for more than five years in that State. If any cause of action the plaintiff had against her, it accrued in Florida, and not in Alabama. The defendant is a *bona fide* purchaser from her. He has no connection with the man who fraudulently took the property from the possession of the plaintiff in Alabama.

GIBBONS, J.—The ruling of the court below on the demurrers filed to the defendant's replications, constitutes the sole question for the revision of this court.

It is contended by the defendant in error, that the demurrers should have been sustained, because the plaintiff had no right to file more than one replication to each plea, and that the pleas, in reply to which the replications are filed, do not fall within the statute of 1846. The language of the section of the act referred to, is as follows: "That hereafter the plaintiff shall have a right to reply as many several matters to any plea of the defendant of set-off, or plea with notice of set-off, or plea of infancy, or the statute of limitations, as the circumstances of the case may seem to require; *provided*, the several matters replied are pertinent to or in avoidance of the matter of the plea." It is undoubtedly true that, where several replications are filed to one plea, unless they are authorized by some special act of the legislature, a general demurrer will prevail as to all of them together, whatever may be the individual merits of each one when considered by itself.—Vance v. Wells & Co., 8 Ala. 401. But in the present case, we consider the language of the above recited act broad enough to cover the case presented, and that the plaintiff was authorized to file as many replications

as he pleased to the defendant's plea of the statute of limitations. It is true the plea is the statute of Florida, but we consider it nevertheless a plea of the statute of limitations, and as falling within the provisions of the act. The language of the act does not limit the plea to the statute of limitations of Alabama, and this would, in our opinion, be giving to the act an interpretation too restricted, and never designed by the legislature.

The first replication presents the question, whether the plaintiff is within the proviso or saving clause of the statute of Florida, set out in the plea. The demurrer, of course, admits all of the allegations of the replication to be true; the question presented, therefore, is, whether a non-resident of the State of Florida, who was such at the time the cause of action accrued, and who has never been in that State from the time that such cause of action accrued up to the commencement of the present suit, is within the saving clause of the statute or not.

We remark, in the first place, that, if language can be made plain, it would seem that a portion of the language of the proviso quoted, has its meaning stamped upon it too plainly to be mistaken. After stating that, if any person or persons, who shall be entitled to any action, (the one adopted in the present suit included *eo nomine*,) "shall be beyond the seas, or out of the country, then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as is before limited after their coming to, or being returned from beyond the seas, or from without this country, as by other persons having no such impediment should have been done." This language is extremely broad, and would seem to include as well non-residents as those who resided in Florida but were temporarily abroad. "Beyond the seas, or out of the country," are the terms used to define the classes of persons to whom the saving clause extends; and again, in speaking of commencing their actions after the impediment is removed, the terms are, "after their coming to, or being returned from beyond the seas, or from without this country." The first of the last named phrases seems to have been employed by the legislature with the distinct view of defining those persons who never had resided in the State, as distinguished from those who resided there, but were temporarily absent. To this latter class

the phrase, "or from without this country," seems to have been applied. This construction leads directly to the conclusion, that the plaintiff was within the proviso, and the demurrer was erroneously sustained.

We do not, however, choose to rest our decision solely upon the construction which we think the language of the proviso above quoted naturally demands upon its face. We think the authorities are clear also, in favor of such a construction, and nearly, if not quite undisputed. In the case of Faw v. Roberdeau's Executor, 3 Cranch 174, Chief Justice Marshall remarks: "Beyond the sea and out of the State are analogous expressions, and are to have the same construction." In speaking of this same expression, "beyond the seas," Mr. Angell remarks: "The before mentioned exception is not confined to subjects who may occasionally leave the country, but is general, and extends to foreigners who are constantly resident abroad.—Thus, it was adjudged that the statute of James only begins to run against a plaintiff, a foreigner, from his coming to England. So that, if he did not go to that country for many years after the commencement of the cause of action, he will still be entitled to six years from the time he goes there, to bring his action. And if he never should go to England, he has always a right of action after six years are elapsed. But, if one of several plaintiffs be abroad, and the other in England, the action must be brought within six years after the cause of action arises. The act of Maryland, of 1818, repealed the exceptions or savings in former statutes in favor of persons *beyond seas*. The unlimited latitude, it was thought, granted to persons *beyond seas*, was considered by the Legislature as unreasonable; and it could constitute no actual grievance or just cause of complaint, if they were reduced to the same standard as the citizens of Maryland. Neither was the repeal a violation of any constitutional obligations of the State; nor was any obligation of contract at all violated or impaired by it."—Angell on Limitations 213 § 13.

This authority would be conclusive, to show that the demurrer to the first replication should have been overruled, even if no other term had been employed in the saving clause than that of "beyond seas." The text of the author above quoted we find based upon authorities in England, and in this country, of a

character that we are not at liberty to disregard, and we are satisfied it is a sound exposition of the law.

But it is insisted, that this construction gives to the non-resident of the State of Florida a superiority over a citizen, inasmuch as five years bar the action of detinue against a citizen, whilst a foreigner or non-resident would be entitled to his action at any distance of time. This is true, but it is not for us to criticise or find fault with the policy of the State of Florida in adding such a saving clause to her statute of limitations; it is enough for us that she has thought proper to adopt it, and it is our duty to declare the law as we find it, whatever may be our own peculiar views as to the correct policy of that State.

Again; it is insisted that the cases of Howell v. Hair, 15 Ala. 194, and Newcombe v. Leavitt, 22 Ala. 631, are decisive of the question under consideration in favor of the ruling of the court below. In this we cannot concur with the counsel. We are unable to see how either of the above cited cases has any bearing whatever upon the question. In the case of Howell v. Hair, the statute of limitations of Georgia was relied upon to show title in the plaintiff. The court sustained the title, ruling that the title made by the statute of Georgia, after the slave was taken from the possession of the defendant, would override the title of the latter. Judge Collier, in delivering the opinion in this case, puts it upon the ground that there is no saving clause in the statute. He says: "This enactment, it will be observed, contains no saving or exception, under the influence of which a plaintiff's right of action is continued beyond the period of prescription, and we are not authorized to presume that any such exists in the legislation of Georgia, applicable to the present case. If there is such a provision, it was incumbent upon the defendant to have produced it, and not upon the plaintiff to negative its existence." So in the case of Newcombe v. Leavitt, the statute of Mississippi was interposed as a bar to the right to condemn the property levied upon, and this court decided that said statute did constitute a bar; but there was no saving clause in that statute, and nothing said about any saving clause whatever. The only application that either of the above cited cases could have to the case at bar, would be to sustain the defendant's plea. For this they are undoubted authority, but have no other application. The present replication, how-

ever, admits the subject matter of the plea to be legal, and the plea good, but seeks to avoid it, by the saving clause of the statute. Our conclusion is, that the saving clause as pleaded, with the averments accompanying it in the replication, avoids the plea, and the demurrer to it should therefore have been overruled.

The reasoning that we have employed to show that the first replication was good, is equally conclusive to show that the second is bad. It will be observed that the first replication derives its genuineness entirely from the saving clause of the statute of Florida, without which it would have been no answer to the plea interposed by the defendant. The second replication is made up of the averments that the conversion was made in Alabama, in 1839, and the slave taken thence to Florida, where she was retained until 1847, and then delivered to the defendant, who brought her back to Alabama, with the further fact that the plaintiff had not in the meantime been in Florida, nor had said slave in the meantime been in Alabama four years.—We see nothing in this replication that answers the plea, or shows any reason why the statute of Florida would not perfect a title in favor of the defendant, and consequently a bar to the plaintiff's suit in Alabama for the slave. The replication does not rely upon the saving clause of the statute, but upon facts outside of it. The demurrer to it was properly sustained.

For the error above noted the judgment of the court below is reversed, and the cause remanded.

WILLIAMSON & WIFE *vs.* MASON.

1. An ante-nuptial contract stipulated that the husband should "receive and enjoy, during the life-times of" himself and wife, "all the rights and profits of the" wife, "and at their decease to descend to the heirs of the body of the" wife "which may survive at that time"; and that the wife "should have no part or portion of the property now owned by" the husband "after his death": *Held*, that the marital rights of the husband were not excluded by the deed, but, having reduced the wife's property into possession during coverture, he thereby became entitled to it until the

death of himself and wife as absolute owner, subject to the contingent limitation to the heirs of the body of the wife who might be living at that time.

2. The rule in Shelley's case enlarges the estate of the first taker only when his heirs general, or the heirs of his body, are the objects of the limitation, and when they take by descent from him, and not as purchasers under the deed; it therefore has no application when the deed is to the husband, for his life and that of his wife, with contingent remainder to the heirs of the body of the wife who may survive them.
3. A contingent interest in personal property, or *quasi* contingent remainder, may be created by deed without the intervention of a trustee.
4. When land is sold under an order of the Orphans' Court for the payment of the debts of the estate, and a surplus remains after paying all the debts, it goes to the heirs as the land itself would have gone.
5. An administratrix is entitled on final settlement to a credit for reasonable counsel fees paid in defending against a previous application for final settlement, to which she had been cited by the distributees before the expiration of eighteen months from the grant of letters.

ERROR to the Court of Probate of Wilcox County.

GEORGE W. WILLIAMSON and Martha J., his wife, filed their petition in the Probate Court of Wilcox, setting forth that one Jonathan Mason, late of said county, died intestate on the 15th of August, 1849; that said Martha is his only heir at law; that Lucy H. Mason, the widow of said intestate, administered upon his estate in Wilcox County, and took possession of all the property of the estate as such administratrix; that said Martha J. is entitled to one half the personal estate and all the real estate (saving to said widow her dower) which belonged to the intestate at the time of his death.

The petitioners set forth the names of divers slaves belonging to the estate, which came to the possession of the administratrix; aver that the debts due from the estate have been paid, and that more than eighteen months have elapsed since the grant of administration; and pray for a rule against the administratrix to compel her to make final settlement, and that the petitioners recover for the use and benefit of the wife, the share to which they are entitled.

Mrs. Mason, after having been served with a copy of the petition, filed an answer thereto, in which she states, that in 1826 Aaron Baldwin, at that time her husband, died intestate leaving her and eight children and a considerable real and personal estate; that she, with one McLendon, administered thereon in

Wilcox County; that she married Jonathan Mason, the intestate, in 1828, who thereupon became co-administrator in her right upon the estate of her former husband, Baldwin; that previous to her marriage with Mason they entered into a marriage contract, dated 28th of November, 1828, whereby it was covenanted and agreed as follows:

"Whereas a marriage is shortly intended to be solemnized, by the permission of God, between Jonathan Mason and said Lucy Baldwin, and whereas said Lucy is heir to a considerable personal estate, claimed by her as widow and heir of the late Aaron Baldwin, deceased, consisting of negroes, bonds and money, as yet undivided; and whereas it is agreed that said Jonathan Mason, after said intended marriage is had, receive and enjoy, during the life-times of the said Lucy and Jonathan, all the *rites* and profits of said Lucy Baldwin, and at their decease to descend to the heirs of the body of said Lucy Baldwin, which may survive at that time; and it is further agreed that the said Lucy Baldwin have no part or portion of property now owned by the said Jonathan Mason after his death. In testimony," &c.

The respondent then avers that she received, as her distributive share in her first husband's estate, $1456 07 in money, and six negro slaves, all which went into the possession of Jonathan Mason, the intestate; that the slaves have now increased to twenty-three in number, and that the remaining property both real and personal, in possession of said Jonathan Mason at the time of his death, was purchased by him after his marriage with the respondent with money which was the proceeds of the labor of said slaves, the property of the said Lucy. She insists that said Jonathan never claimed said property as his, but always during the coverture acknowledged her right to the same.

Respondent further answers that the personal estate of the intestate, exclusive of the slaves, being insufficient for the payment of the debts, she petitioned the Probate Court, according to the statute, for leave to sell the real estate in lieu of the slaves, as most conducive to the interests of the estate; that this was done at the request of the plaintiffs in error, who were made parties to the proceeding, and who made no objection to such order. She claims that the estate is her debtor for the $1456 07 received by the intestate, and that she is exclusively

entitled to the property and its proceeds which came to her said husband's hands as her share in her former husband's estate.

This answer was demurred to, and the demurrer having been overruled, the plaintiffs took issue upon it, denying its allegations.

On the final settlement, as appears by the decree, it was shown that Martha J. Williamson was the only heir of Jonathan Mason, the intestate; that Lucy, the administratrix, was his widow, and that they were the only persons entitled to share in the distribution of his estate.

It was shown that the marriage contract before recited was entered into; that the marriage was solemnized shortly thereafter; that $1456 07, and the six negroes, were received by the intestate as the share of Lucy Mason in her former husband's estate; and that the husband (Jonathan) had retained the same in his possession until his death, having stated, about a year after his marriage with said Lucy, to one McLeod, that he then owned no property except a horse, and that the slaves so received by him belonged to his wife.

Said Lucy also introduced in evidence a paper, which she proved to be in the hand-writing of said Jonathan, and which is as follows: "A list of my property in truth and honesty, before God and man, which every dollar of should belong to Martha J. Mason, my daughter, at my death." Here follows a description of certain lands, live stock and other personal property, embracing eleven negroes by name, and a memorandum of money due him and of the amount of his indebtedness, as also of four other slaves belonging to him at W. T. Mason's. This is signed by him, and dated the 6th day of July, 1842.

It was proved that the slaves mentioned in the memorandum were slaves purchased by Jonathan Mason after his marriage with said Lucy.

The proof further showed that the intestate owned at the time of his death two tracts of land, for one of which he had only made partial payment. These were sold under the statute, (Clay's Digest 195 § 18,) instead of the slaves, and a surplus remained after the payment of the debts. This surplus was claimed by the plaintiffs for Mrs. Williamson as heir at law, and by the administratrix as assets for distribution. The court held that it descended to the heir, as the land would have descended had no sale been made.

The administratrix claimed to be allowed one hundred dollars credit upon her account, which was proved to be a reasonable compensation to Messrs. Stone & Judge, in defending her against a previous application for settlement made by the plaintiffs before the eighteen months had expired.—See the decision of the Supreme Court upon this application, 18 Ala. 87. The Probate Court refused to allow the item as a charge against the estate, and the administratrix excepted.

The Probate Court decreed that the twenty-three slaves embraced by the marriage contract above referred to, together with the sum of $1456 07, should be retained by the administratrix; that the surplus of the sales of the land belonged to the heirs as real estate, and that the widow took no interest in it; and that the remainder of the estate should be equally divided between the administratrix and the said Williamson and wife for the use of the latter.

Both the parties are dissatisfied with the decree, and assign errors in this court.

Elmore & Yancey, for plaintiffs in error:

The first question to determine is, whether personalty can be limited as fixed by this instrument. The following propositions are undeniable:

1. At common law, originally, no remainder could be limited on a chattel after a life estate, either by will or deed.—Lewis on Perpetuities, top pp. 92, 93, 99; Williams on Personal Property, top pp. 123, 124.

2. Such limitations were at length permitted by will, or deed to trustees, but in no other manner.—Lewis on Perpetuities, top pp. 93, 94, 95, 99, 100, 101; Williams on Personal Property, top pp. 124, 125.

3. It is the settled law in the English courts, that a remainder in personalty can only take effect as a bequest, or by deed through the medium of trusts.—Lewis on Perpetuities, top pp. 100, 101, 103, 104; Williams on Personal Property, top pp. 124, 125, 187.

On pages 124 and 125, of Williams on Personal Property, will be found his remarks, which are referred to by the opposite counsel as sanctioning the idea that a remainder in personalty may be created by deed, without the form of a trust. He says:

"In equity, therefore, under a gift of personal property, of any kind, to A for life and after his decease to B, A is merely entitled to a life interest, and B has during the life of A a vested interest in remainder"; and refers in note m. to Fearne on Con. Rem. 407, and 1 Coll. 285. The author is discussing the distinction in courts of law and equity in regard to the title, and says that at law the entire interest is in the first taker, but courts of chancery carry out the intention of the parties, and adopt a different rule from courts of law; and that wills are in the nature of trusts over which courts of chancery can and will take jurisdiction and enforce them. Gifts are bequests; when the term is used in the English courts, it is always meant gifts by will. Mr. Williams did not mean that a limitation by deed without trust was good, or, if he did, he is not sustained by his own references, or by any case in the English books. He has no where said that such a limitation by deed without trustees was valid. All the cases in Fearne, from page 402 to 407, which are the citations from Williams, arose on bequests; and the case from 1 Coll. was on a will. After giving illustrations, Williams proceeds on page 125: "Where, therefore, it is wished to make a settlement of any kind of personal property, the doctrine of the court of chancery is at once resorted to.—The property is assigned to trustees in trust," &c.

Again; on page (top) 187 he says: "Lands, &c., may be held for life, or in tail, as well as in fee, and may be disposed of by contingent remainders, shifting uses and executory devises, without the intervention of trustees. Personal property, on the contrary, cannot be settled without the intervention of trustees." On page 35 (top) he says: "But the law knows no such thing as a remainder or a reversion of a chattel."

On page 127 (top) he says: "But a gift of personal property to A for life, and after his decease to B, gives to B a vested equitable interest," &c., and refers to 2 Brown Ch. 75. This was on a bequest.

The opposite counsel has cited page 127 (top) of Williams on Personal Property. This we think entirely with us. The instances cited prove it; in the one case, by deed to trustees, and in the other, by bequest.

We are obliged to conclude, that, when Mr. Williams used the term "gift" he meant by will, since such is the usual mode

of expression in the English courts, and since all the cases referred to by him are on wills, and since he says himself, where it is desired to make a settlement of personalty, the rules of the courts of chancery, that is trusts, are resorted to.

We will here remark, although Williams and Lewis both speak of such limitations as taking effect in the nature of springing or shifting uses or executory devises, or on the same principle, it is questionable, (we might say impossible,) for them to take effect as springing or shifting uses, because the doctrine of these uses is applicable strictly to lands alone, being modes of settlement by instruments *inter vivos*, based upon the statute of uses, and arising solely on the trusts created by the instruments. But, if the doctrine is held applicable to personalty, then there must be a conveyance to trustees, declaring the use, &c. For a short but clear and comprehensive view of this doctrine, see Lewis on Perpetuities, top p. 103.

On page (top) 104, Mr. Lewis says, in relation to limitations of chattels by deed: "The limitation by way of trust is resorted to from imperative necessity, there being no mode known to the common law by which future and executory interests in chattels may be created by instruments *inter vivos*;" and adds that executory devises and bequests, and springing and shifting uses, differ only in the quality of the estate created by them respectively; and that whatever estate may be created by will, may likewise be settled by deed through the medium of trusts, that is, when settled by will, each one who takes, takes the legal title, but when by deed, through the medium of trusts, takes the use only.

Both these authors, Lewis and Williams, agree that such limitations cannot be created except by will or as trusts declared by deed.

Blackstone in his 2 Book, vol. 398, after giving a history of the progress of the law on this subject, says: "But now that distinction is disregarded, and if a man either by will or deed limits his books or furniture to A for life, with remainder over to B, this remainder is good." He is speaking of the distinction between the use of the thing and the thing itself, which distinction is now done away with. To ascertain if he meant that such limitations were good, when made by deed without trusts, we must examine the authorities cited in the note. The

case in 2 Freeman 206, we have not been able to find reported, but the same case is referred to in Fearne on Con. Rem. 406, and it was upon a bequest of goods; and the point decided was, that there was no difference between the gift for life of the goods, and of their use for life. The case of Childs v. Childs, Cro. James 459, was a case on a bequest.

We have examined every English case cited in any of the books, and none of them sustain the opinion that such limitations can be made, unless by will or deed by way of trusts. It may be regarded as the settled law in England, without a single authority to the contrary, that the limitation in favor of the heirs of the body of Lucy Mason is void, and that the husband took the entire interest.

In the American courts we have been unable to find the point decided, except in two States, North Carolina and South Carolina. Chancellor Kent, vol. 2 p. 352, says: "Chattels may be limited over by way of remainder, after a life interest in them is created, though not after a gift of the absolute property. The law was early settled that chattels real might be so limited by will. A chattel personal may also be given by will (and it is said that the limitation may be equally created by deed) to A for life, with remainder over to B." He expresses this doubtingly, by the terms "it is said," and refers to 2 Blackstone 398, and Cro. James 459, which have already been noticed, and do not authorize the doctrine.

On the next page he says: "This limitation over in remainder is good as to every species of chattels." In the notes b and c, he refers to English cases, every one of which is on wills, so that he also meant limitations by will or deed to trustees.

All the American cases cited by Kent in notes b, page 352, and d, page 353, in favor of the limitations, arose on wills, except those from South Carolina.

Powell v. Brown, 1 Bailey 100, admits that the law as decided in England prohibits the limitation, but decides differently, and attempts to sustain the decision by the authority of cases in Bay and Dessaussure. Dolt v. Cunnington, 1 Bay 447, only decides that a limitation for life, and then to the heirs of the body of the first taker, gave to him the whole interest. The point we are considering was not made or decided. Dolt v. Wilson, 1 Bay 452, was upon a will; Stockton v. Martin, 2

Bay 471, was upon a will; Tucker v. Stevens, 4 Des. 582, was on a deed, signed by donor and donee, containing a covenant that the donee should hold the slaves for life, and at her death they should return to the donor and his heirs, unless, &c.

The point was not made or decided, but, if it had been made, the decision would be sustained on the ground of the donee's covenant, to the performance of which as a trust the court of chancery would compel her.

Millidge v. Lamar, 4 Dess. 617, was decided on the ground that the deed and will both formed one testamentary disposition alone, and therefore was on a will. So that the case of Powell v. Brown is not sustained by any English or American case; and the observation of the court that the question's not having been previously made was an argument in favor of the limitation is entitled to no weight. This fact, in our opinion, proves nothing, except that the lawyers did not understand the English decisions, but were probably misled by the term "gift." But the court refers to a decision pronounced by Judge Wilde, which, however, was never printed, affirming the English doctrine. In Brummet v. Barb, 2 Hill 543, that court has gone to the utmost extent; they say a delivery, with a parol declaration of the different interests intended to be given, will be a good limitation. But they have been compelled to put it on the doctrine of trusts, thus showing that the English cases are right. But is it not strange that the English lawyers never made the discovery that when A received personalty under a deed to him for life with remainder to B, that A was a trustee for himself and B? Indeed, in the case just cited, it is said all bailments are trusts. This shows the shifts to which courts are driven when they depart from the established rules of law, because they cannot see the reason.

The cases in North Carolina sustain us. Judge Hall, in 2 Hawks 323, says: "As to personal chattels, it remains the same unless such limitations over are created by will or by trust. I am not aware of any case that can be shown to the contrary." Graham v. Graham, 2 Hawks 322; Morrow v. Williams, 3 Dev. 263; Sutten v. Hollowell, 2 Dev. 185.

But, admitting that such limitations are good, they can only be permitted to take effect as an executory devise, or on the same principle that such bequests are allowed; or, if it is in-

sisted that the doctrine of springing and shifting uses must be applied to this instrument, we think it equally clear that the remainder has been defeated, and that the slaves belong to the estate of Mason.

One of the rules applicable to springing and shifting uses and executory devises, is, "that whenever a future interest is so limited or devised as that it may take effect as a remainder, either vested or contingent, it shall never be construed to be a springing or shifting use or executory devise. Thus, if land be limited in use or devised to A for life and after the decease of A and B to C in fee, this is a contingent remainder to C, and the limitation shall not be supported as a springing use or executory devise in the event of A's decease in the life-time of B, which will prevent its taking effect as a remainder."

This rule has uniformly prevailed without any exception to the contrary.—Lewis on Perpetuity, top page 109, and cases cited in notes.

"Thus if a person limit or devise property to A and B for their joint lives, or to C for the joint lives of A and B, and after the decease of both A and B to D, D takes a contingent remainder which will fail, unless in the most improbable event of the simultaneous extinction of both the *cestuis que vie*."—Lewis on Perpetuity (top page) 110.

The true construction of the instrument is, to give to Mason the property for the joint lives of himself and wife, and on their death to the heirs of her body—in which case, on the death of either himself or wife the remainder was to take effect; or it gives to Mason an estate for his own life, and at his death remainder over. The latter construction would seem most probable from the situation of the parties. The other is the construction from the plain import of the words. There is no difference in the meaning of the words "during the life-times of the said Jonathan and Lucy, and at their death," and the words, "to A for life and after the decease of A and B to C;" in both and all the law says it means joint lives and death of either, so that on the death of either the remainder must take effect or not at all.

It cannot be denied this remainder was created and intended to take effect as a remainder, and that it might have vested as such by the death of the wife before the husband, leaving heirs

of her body surviving. Then if such is the case, if on the happening of the event when it was to vest, there is no one *in esse* to take, the slaves must belong to the estate of Mason. It is insisted, that Mrs. Mason takes an interest for her life, and on her death the heirs of her body may then take by way of springing use. This has been answered by the rule that in deeds or even in wills, where the future interest is created by way of remainder, if by possibility it can take effect as a remainder, it shall never assume another form as a springing use or executory devise. It was possible for Mrs. Mason to die first, indeed for both to die at the same time; and in such cases being limited as a remainder, it must take effect as such or not at all. Nor has Mrs. Mason any reversionary interest in the negroes. As shown above, there is no such thing as a reversion in chattels. But if there was, Mrs. Mason by the instrument parts with the entire interest, and this shows that she did not intend to reserve any thing to herself, but to give it to those named if they could take; and if they could not take, then the law says she intended to give it to those whom the law says should take on the happening of the event to determine this question. In other words this was her deed: I give these slaves to my husband during our lives; if I die before him, then to the heirs of my body surviving me. If he dies before me, then to him, his executors &c.

It is said, however, that the rule above laid down as to remainders taking effect as such applies only to realty. The court will see that we do not put it on the ground that the particular estate is destroyed before the time for the remainder to vest, but on the ground that certain persons as a class are to take on the happening of a particular event, and all who answer that description when the event happens take; but if there be none of that class, what is to become of the property? It can't revert. Suppose Mrs. Mason had died first, leaving no heirs of her body. In contemplation of law, the same results happen from Mason's dying before her. For the contingency of his dying first they did not provide in the instrument, but the law has made the provision. If the instrument had said, "and if on their death there should be no heirs of the body of the said Lucy surviving, then to her if she be living, and if dead to her next of kin," would a moment's doubt be entertained that Mrs. Mason would under the deed, she living at Mason's death, have taken the ne-

groes absolutely, and not as trustee to hold until a use should spring up by her death for the heirs of her body.

But this limitation can be sustained only by the application to it of the rules governing springing uses and executory devises. On this ground alone have they been permitted in the English courts either by will or as trusts by deed; and it will not be permitted in one breath to say they are of that nature, and in the next to deny that an invariable rule of such limitations is not applicable to personalty. We have always understood that more latitude was given in the settlement of real than personal estate; but a contrary doctrine must be established, if the views of the counsel opposed to us prevail.

WATTS, JUDGE & JACKSON, *contra:*

1. Under the deed of marriage settlement, we concede that the husband took a life estate, there being no words excluding his marital rights. But did he take an interest longer than his life-time, the wife surviving him? If the word "life-times," used in the deed, means during her life-time as well as his, then it would follow that his interest, or rather that of his executors since his death, would embrace her life-time also. Does he take any other or further interest? To solve this question will depend, first, upon whether the children of Lucy Mason are so designated in the instrument, as that they will take as "purchasers." The language is, that at their decease, the property is "to descend to the heirs of her body, which may survive at that time;" i. e. at her death, as the matter now stands. This language, if it were used in reference to real estate, would not create an estate tail. It needs no authority to show this. It follows, then, that by the use of these words the children of Lucy, who may survive her, are intended to be designated as a class, to take the property at her death. And it will follow necessarily that the children of Lucy, who may survive her, will take at her death, unless some technical rule of the law prevents.

Now it is contended that the termination of the particular estate, or rather the death of the husband before the time when the children of Lucy can take by the terms of the deed, vests the whole interest in the husband. If the same rule, which applies to real estate, were applicable to personal property, we

would not controvert this position of the opposite counsel. But it is well settled by authority that there is no such rule as applicable to the latter species of property.—See Williams on Personal Property, top page 127, and the authorities there referred to. The case he puts is in principle precisely such as the one at bar. Then, under this view, the property would have to be distributed to the heirs of Mason, to be held by them only during the life-time of Lucy. At her death the interest of her surviving children "will spring up, as it were," on the happening of this event.

The authorities cited by the counsel on the other side from "Lewis on the law of Perpetuity" on pages (top page) 109, 110, have reference solely to real estate, and have no application whatever to personal property.

2. An interest of a future nature may be created in personal property either by will or deed. This future interest cannot be called strictly a remainder either vested or contingent. Still, it is permitted, and it matters not by what name it may be called. The authority cited by the opposite counsel from Lewis on Perpetuity, on page 101, does not sustain the doctrine that there must be a trustee *eo nomine* to sustain by deed the future interest in personal property. If it were necessary to protect the future interest, the tenant for life would be held as a trustee for that purpose, as has been repeatedly held in reference to settlements between husband and wife.—See Story Eq. 2 vol. p. 816 §1380. In the case of Price v. Price, 5 Ala. 578, it was held that the remainder was good, although there was no trustee. That case is very much like this.—See also Powell v. Brown, 1 Bailey 100, in point. It is intimated in that case, however, that the death of the husband before the wife would have defeated the rights of the children of the wife. We think it is apparent, however, that the learned judge who delivered the opinion in that case did not advert to the distinction between personal and real estate: a distinction which is as well settled as the rule itself.—See the reason given in William on Personal Property, on page (top page) 127–8. Why, the rule applicable to real estate cannot apply even in England to personal propty, much less should such rule be applied in this country, where the whole doctrine of feuds has no application whatever.

3. But we submit to the court, that the word "life-times"

used in the deed means "joint lives," i. e. the husband would take only an interest so long as he and his wife both jointly live. Then whenever he died his interest would cease, and the wife would continue to be the owner of the property until her death, unless by virtue of his marital rights independent of the deed he acquired all the interest which his wife had in the property. Now it is always said that no technical words are necessary to exclude the husband's marital rights. Any thing which indicates an intention to do so will be so construed. It must be obvious that this deed was drawn by an unskilled hand. Now the deed gives him a particular interest, which is clearly defined and limited to their "life-times," i. e. their "joint lives." Does not this necessarily exclude any other interest than that given by the deed? *Expressio unius est exclusio alterius.* Why shall not this maxim of the law apply as well to deeds of settlement between husband and wife as between other persons?

If we are right in this position, the property cannot be distributed amongst the heirs of Jonathan Mason at all.

CHILTON, C. J.—Lucy Mason, late Lucy Baldwin, while the widow of Aaron Baldwin, and entitled as such to an undivided interest in her deceased husband's estate, consisting of negro slaves, moneys and choses in action, being about to marry Jonathan Mason, entered into an ante-nuptial contract with him, which is as follows:

"Whereas a marriage is shortly intended to be solemnized, by the permission of God, between Jonathan Mason and Lucy Baldwin, and whereas said Lucy is heir to a considerable personal estate, claimed by her as widow and heir of the late Aaron Baldwin, deceased, consisting of negroes, bonds and moneys, as yet undivided; and whereas it is agreed that said Jonathan Mason, after said intended marriage is had, receive and enjoy, during the life-times of the said Jonathan and Lucy, all the rights and profits of the said Lucy Baldwin, and at their decease to descend to the heirs of the body of the said Lucy Baldwin, which may survive at that time; and it is further agreed, that the said Lucy Baldwin have no part or portion of the property now owned by the said Jonathan Mason after his death. In testimony whereof," &c. Signed by the respective parties, and dated 22d November, 1828.

The parties intermarried shortly after this agreement was entered into, the husband reduced the property of the wife, consisting of six negro slaves and $1456 07, into his possession, and about a year thereafter said to a witness that all the property he had in possession belonged to his wife, except a horse. It appears that he retained the slaves up to the period of his death, which happened in August, 1849, they having in the mean time increased to twenty-three in number.

Mrs. Mason, at the time of her second marriage, had some eight children living by her former husband, but bore none to her second. She administered upon the estate of Jonathan Mason, and on the petition of his only child (Mrs. Williamson) and her husband, is ruled to a settlement of her administration before the Probate Court. In that settlement, the question arose, whether the twenty-three slaves and the $1456, the property and its increase mentioned in the agreement, belonged to Mrs. Mason, or passed to her as assets of the estate of her husband, the said Jonathan. The Probate Court ruled that they were not assets, and she was held not liable to account for them. This constitutes the main subject matter for revision.

1. There is no principle of the common law better established than that marriage is a gift of all the wife's personal chattels in possession to the husband, and of such as he reduces into possession as husband during the coverture. The share of the estate of Aaron Baldwin to which Lucy, his widow, was entitled, was reduced into possession by Mason, her second husband, and his marital rights attached, and the property became absolutely his, unless he is excluded by the terms of the deed entered into between them prior to their marriage.

2. In construing this deed, with reference to the husband's exclusion, it is proper to premise, that the law favors the marital rights of the husband, and unless from the words of the instrument the purpose to exclude him clearly appear beyond any reasonable doubt, he still retains his ordinary legal and marital rights over the property—2 Story's Eq. Jurisp. § 1381.

3. The deed before us contains no words of exclusion as to the marital rights of the husband. It confers on him all the "rights and profits" of Lucy to the property during the "life-times" of the parties, that is, for the life of each and the survivor.—In other words, the husband's interest was not to terminate until

the death of both husband and wife; for "at their death" the property is to descend to the heirs of the body of the wife then living.

The instrument reserves no interest in the property whatever to the wife, and it follows, that, after it was reduced into possession by the husband, he took whatever interest the wife had by virtue of the marriage, conceding, for the sake of the argument, that he failed to take her entire interest under the deed.

The husband then was the owner of the absolute property in the chattels, but subject to the contingent limitation to the heirs of the body of the wife who might survive at the time of their death. As the heirs of the body of the wife may not be, and in fact in this case cannot be, the heirs of the husband, since they had no issue, it follows that the rule in Shelley's case has no application by way of enlarging the first estate, since that rule only applies to enlarge the estate of the ancestor whose heirs generally, or the heirs of whose body, are the objects of the limitation, and who can take by descent from him, and do not therefore take as purchasers under the deed.

4. It follows, therefore, that the interest of the husband continues for the life of the wife, and is assets in the hands of his executor, and there is a contingent interest, or *quasi* contingent remainder over. The question comes up, whether such interest can be created by deed, without the intervention of a trustee. This point appears to have been settled in the case of Price v. Price, 5 Ala. R. 578; and although the doctrine as there asserted is opposed to the English, as well as to many of the American authorities, yet, as it establishes a rule of property under which many titles may have accrued, we feel bound to adhere to it, without, however, conceding that a sale of the property by the first taker would defeat the remainder over, as asserted *arguendo* in that decision.

5. The money for which the land was sold must be regarded as the substitute for the land, and when the object for which the sale was made, namely, the payment of the debts of the estate, was accomplished, the remainder of the proceeds were properly decreed to go, as the land would have gone, to the heirs.—Whether the heirs would be entitled to be refunded out of the personal assets the entire amount of the proceeds of the sale,

and if so, whether the Probate Court is competent to do this, are questions not now before us.

6. The proceeds of the sale which remained after the payment of the debts not being personal assets of the estate, the court very properly refused to allow Mrs. Mason any share in the same. It does not appear that any question was raised as to her right of dower; but if her claim to share in the surplus proceeds of the sale of the land was predicated upon that ground, we are satisfied it was properly rejected, since it does not appear that her dower interest in the land was disposed of, even conceding that the Probate Court could have assigned dower out of the proceeds—a jurisdiction which we should be strongly inclined to deny; but we leave it an open question, since its decision is not involved in the case before us.

We have now disposed of the assignment of errors on the part of Williamson and wife, and it results from what we have said that the decree as to them is erroneous, and must be reversed.

7. It remains only to consider one assignment by the counsel for Mrs. Mason, namely: the rejection of the item of one hundred dollars paid Messrs Stone & Judge, attorneys, for defending her against the previous application of Williamson and wife.—The record furnishes no ground for the rejection of this item. It appears to have been an item of expense incurred in good faith and necessarily, in the management of the business of the estate.—Gerald & Wife v. Bunkley, 17 Ala. R. 170. This is an error for which the decree must be reversed in favor of Mrs. Mason.

Decree accordingly reversed and remanded. Let each party recover their cost.

PAULLING *vs.* MEADE.

1. When a judgment debtor, or his assignee of the equity of redemption, files a bill to redeem lands sold under execution, he must allege in his bill the performance of all that the statute requires of him; if he fails to allege that possession was delivered to the purchaser without suit, his bill is without equity.
2. When a judgment creditor files a bill to redeem, he must allege in his bill a tender of the amount of the purchaser's bid, together with ten per cent. thereon, and an offer to credit his judgment against the defendant with the further sum of ten per cent. on the amount of the bid.

ERROR to the Chancery Court of Marengo.

Heard before the Hon. J. W. LESESNE.

THE bill in this case is filed by the complainant, William K. Paulling, in the character of purchaser of the equity of redemption of one McNaughton, to certain lands in the county of Marengo which had been sold by the sheriff of said county under sundry orders of sale issued out of the Circuit Court, and bought by the defendant, Lucien Meade; and as the judgment creditor of McNaughton, by assignment of the unsatisfied judgments under which the land was sold by the sheriff.

It alleges that sundry persons, having obtained judgments before a justice of the peace, against McNaughton, caused them, in default of personal property, to be levied on certain lands set out in the bill, and having procured orders of sale as the law directs, had the same sold by the sheriff of Marengo County, in which they are situated, and the defendant became the purchaser on the 1st Monday in January, 1849; that afterwards, on the 14th day of July, 1849, the complainant became the purchaser of all the interest and the statutory equity of redemption in said lands from McNaughton, and took from him and his wife a conveyance thereof, which is exhibited with and made a part of the bill; that complainant also became the purchaser of all the judgments under which the land was sold, much the larger portion of which was wholly unsatisfied by the sale of the lands, and is yet unsatisfied; that anterior to the judgments and the sale of lands mentioned in the bill, McNaughton had

made a mortgage of the land to Baron, Meade & Co., of which firm Lucien Meade, the purchaser, is a partner; that previously to the judgments against McNaughton and the sale of the land, to-wit: on the 17th day of August, 1846, McNaughton made a mortgage upon it to Baron, Meade & Co., to secure a debt for the sum of $395, due in the fall of 1845, with a credit of $65; that the law day of the deed was the 1st January, 1847; that shortly after he (complainant) purchased said judgments and became entitled to redeem, he informed Meade of his intention to do so under the statute, but said Meade affirmed he never should redeem said lands, and that he never would accept the money tendered, nor reconvey them; that about the 29th of October, 1850, complainant went to the city of Mobile, in which Meade resides and does business; that complainant went to his store, which was his usual place of business, and finding him absent, tendered to the principal manager of his business the amount bid by him at sheriff's sale and ten per cent. per annum interest thereon, with such lawful charges as were due to him thereon, and his agent refused to receive the sum so tendered, or to reconvey the land; that Meade was absent from the State of Alabama, and continued so absent for from four to seven months in the year 1850 in the northern portion of the United States; that after Meade's return to Mobile, complainant again visited that city with the view of renewing the tender, and procuring a conveyance of the land, but before he reached there Meade had again left that city for New Orleans; that complainant appointed James Crawford his agent, and through him, on the 12th May, 1851, tendered the amount bid by said Meade for said land, with ten per cent. per annum interest thereon, and all lawful expenses and charges thereon, and also tendered the amount due to Baron, Meade & Co. on their mortgage, with legal interest thereon, and demanded a reconveyance thereof; all which was refused.

The bill brings the sum necessary to redeem the land from Meade, as purchaser at sheriff's sale, into court, and again tenders it. It further charges "that, after he (complainant) became owner of said judgments and equity or right of redemption, McNaughton had left it," and as the buildings were going to decay, complainant took possession of the premises, which he still retains, to preserve and use them; that Meade has com-

menced suits against him in Marengo County, one an action of trespass to try titles and for mesne profits, and the other for pretended damages for waste of timber. He prays a reconveyance of the land, a perpetual injunction to the suits at law, and general relief.

Meade answers, admitting the purchase of the land as stated, but denies that he ever refused or said he would refuse to allow complainant to redeem if he was entitled to the privilege of doing so, but referred him, when he said he intended to redeem, to Wm. M. Brooks, Esq., his attorney at law and in fact, to attend to all matters relating to the land in question, and informed complainant that said Brooks was his agent, with full authority to attend to all matters relating to the land; that Brooks then resided in Marengo County, in which county complainant also lived, and not more than fifteen or eighteen miles from him, and continued to reside there until the time for redemption had passed; that the offer to redeem, which complainant pretends to have made at defendant's business house in Mobile, was made to his mercantile clerk, who had nothing whatever to do with the lands in question, and during the temporary absence of defendant at the northern cities to purchase goods; that the tender made by Crawford was after the expiration of the time allowed by the statute to redeem, and he was not bound to accept it; that during the whole period allowed for redemption, Mr. Brooks was his authorized agent to attend to it, and this fact was known to complainant; that respondent resorted to no stratagem or subterfuge to prevent a redemption on the part of any person entitled to it; that complainant had frequent opportunities of making the tender to respondent, but never did.

The case was submitted in the court below on two motions, first, to dismiss the bill for want of equity; and second, to dissolve the injunction on the answer.

The Chancellor held the bill to be without equity, and dismissed it. From this decree a writ of error is prosecuted to this court, and it is here assigned for error.

Joseph R. John, for plaintiff in error:

I. McNaughton and wife could sell, and Paulling purchase their right to redeem under the statute. The purchase by Paulling of their right, and tender of the money to the pur-

chaser, entitled Paulling to a reconveyance under the statute.—7 Humph. 726, 730; 11 Illinois 519, 522; 7 Cow. 540, 553.

II. The judgments under which the land was sold were still unsatisfied. These creditors had a right to redeem; Paulling purchased their judgments, and they were assigned to him; by that assignment he was a *bona fide* creditor under the statute, and as such entitled to redeem.—11 Illinois 445; 1 Cowen 443, 457; 7 Cowen 540; 17 Ala. 500; 18 Ala. 708; Clay's Digest 503 § 5.

III. These authorities show conclusively that the complainant was entitled to redeem, either as assignee of McNaughton, the debtor, or as a judgment creditor, and in fact in both capacities.

IV. The allegations in the bill fully show this right in both capacities, and set out the tender sufficiently and in time, as well as show reasons which rendered a tender unnecessary, therefore the bill is sufficient in its allegations; but, if there is a defect in some of its allegations, the complainant should have had an opportunity to amend, but never was allowed. If the bill makes a case for relief, it should not have been dismissed because of defective averment. As to tender, see Appleton v. Donaldson, 3 Barr Penn. R. 381, 383; Moffat v. Parsons, 5 Taunton 307; 2 Green. Ev. 499 § 606; 4 Phil. Ev., note 180, page 234.

V. The decree seems not to controvert the above positions of law, but is predicated on the proviso in the statute. The Chancellor mistakes the allegations of the bill in this respect. The bill shows that McNaughton, the defendant in execution, did give up the possession without suit. The bill shows a literal compliance with the proviso on the part of the defendant in execution, and the right to redeem, so far as the proviso is concerned, was perfect and vested when Paulling purchased. The operation of the proviso is the subject matter of defence. If the complainant comes within the statute, he need say nothing of the proviso.—Clay's Digest 502 § 5.

VI. McNaughton having complied with the proviso, and the complainant having become his assignee, as alleged in the bill, all that remained to be done to perfect the right to a reconveyance was a tender of the money, which is alleged. When McNaughton left the premises, if he had tendered the money ac-

cording to the statute, he would unquestionably have been entitled to a conveyance. Paulling, being his assignee when the tender was made, had the same right.

VII. This being so, can the mere fact that Paulling ousted Meade after McNaughton left the possession, produce a forfeiture of this right? Certainly not. This entering into possession by Paulling was, at most, but a trespass, and for this trespass he is responsible for damages; but he forfeits no other right. Otherwise, he suffers the loss of his right to redeem, loses his debt, and is responsible in damages besides. This would be a triple penalty, and would also defeat the ends of the statute. A proviso should never receive such a construction. Besides, it does not appear from the bill that McNaughton was in possession at the time of execution sale, and therefore the proviso does not apply to this case.

VIII. But admit that Paulling, by going into possession, forfeited his right to redeem as the assignee of McNaughton. This fact certainly cannot prevent him from redeeming as a creditor, because the statute proviso does not apply, and never was intended to apply to creditors. Any one having the right to redeem can do so, whether in possession or not, as all the cases in Tennessee show. But for the proviso here in our own statute, the rule would be the same with us. The proviso does not apply to creditors; therefore a creditor can redeem, although in possession.—6 Humph. 134; 7 Humph. 291.

IX. The act of 1842 is a remedial statute, passed for the benefit of the debtor, and should be so construed as to accomplish the intention of the legislature. Being remedial, it must be liberally construed.—7 Cowen 553.

X. The Chancellor seems to be of opinion that Paulling should have abandoned the possession before filing his bill, and that by giving up the possession now he can then file his bill. This may be true. But it is doubtful whether he can better his position by any act done after the expiration of the two years. Can any act done after that time relate back, so as to perfect the right to redeem? It would seem from the current of the authorities that the abandonment would not now aid Paulling, though the point is not settled; and if he can cure the defect by abandonment, then the consequences would not be so serious. The authorities relied on for the defendant in error do not affect

or conflict with the above positions. The case in 1 Cowen 501 merely determines that a mortgagee is not within the statute, and cannot redeem; the mortgagor is, and therefore can redeem. The case in 4 Cowen determines that, after the time has expired, no redemption will be allowed. The case in 19 John. 381 settles that a judgment lien is necessary in order to redeem under the N. Y. statute; our statute is different, and the N. Y. case and others on this point do not apply with us.—13 Ala. 604; 11 Illinois 445. Waller v. Harris, 20 Wend. 555, and Dickinson v. Gilliland, 1 Cow. 481, simply determine that the statute must be complied with before a redemption will be allowed; this we do not deny. The case of the Branch Bank at Decatur v. Donelson, 12 A. R. 741, is as to statute of nonclaim, and is not in conflict with our rights.

Wm. M. Brooks, *contra:*

The purchaser of land at execution sale becomes "the absolute owner," and the creditor or former owner has nothing but the naked right of redemption, which is irretrievably lost unless asserted in the time and manner prescribed by law.—Ransom v. Pillow, 7 Humph. 291. A failure to tender the amount prescribed by the statute will be fatal to the right to redeem, although it arises from mistake.—Dickinson v. Gilliland, 1 Cow. 498; *Ex parte* Penn. Iron Co., 7 Cowen 550. If the tender is not made strictly within the two years after the purchase, it is too late.—Pugsley v. Lather, 1 Wend. 42.

The bill in this case is defective for uncertainty. It does not explicitly state whether the complainant claims the right to redeem as assignee of the judgments, or as assignee of McNaughton's rights. If he seeks to redeem as a creditor, his bill is defective, because it does not show that he has complied with the requisitions of the statute.—Clay's Digest 502 § 2. The allegation as to the tender made is insufficient in failing to aver an offer to credit the defendant in execution with the "further sum of ten per cent. on the amount bid." It is also defective in not alleging that complainant prepared and tendered a deed to defendant, and demanded its execution; and also in not specifying the sum tendered.

If complainnnt seeks to redeem as assignee of McNaughton's rights, his bill is equally defective. It is obnoxious, in this view,

to all the foregoing objections, except as to the offer to credit the debtor with ten per cent. on the amount of the bid, and to the further objection that it does not aver the delivery of possession to the purchaser without suit; but, on the contrary, shows that McNaughton abandoned the possession to Paulling, who has kept Meade out up to the present time. Before Paulling can successfully seek equity, he must do equity. If he is clothed with McNaughton's rights and privileges, he is also bound to the performance of his duties. By retaining the possession, he has forfeited all right to redeem.

LIGON, J.—Before proceeding to consider the case really made by the bill, it is best to remark, perhaps, that it is not in any aspect a bill to redeem under the mortgage from McNaughton to Baron, Meade & Co., as it is wholly deficient in the allegations and parties necessary to make it such. All the allegations which it contains with reference to this matter will, therefore, remain wholly unconsidered, and we will address ourselves to the case as one arising under our statute to prevent the sacrifice of real estate.

Under that act, two classes of persons are privileged to redeem, viz., the defendant in execution, who delivers possession without suit, and *bona fide* creditors. The former of these can never be mistaken; and the latter, by previous decisions of this court, are held to be composed of all creditors who reduce their claims to judgments before the time for redemption has expired. —Clay's Digest 502 §§ 1, 2; Scales v. Thomason, 12 Ala. 309.

In both these characters the complainant, by his bill, claims to stand. He claims to represent McNaughton, the defendant in execution, by virtue of McNaughton's conveyance to him of his equity of redemption in the lands in dispute; and to occupy the place of a creditor, by virtue of his purchase of the outstanding unsatisfied judgments under which the lands were sold by the sheriff at the time Meade, the defendant, became the purchaser.

That the judgment debtor has the right to sell his equity of redemption, cannot be questioned; and when sold, the purchaser becomes substituted to all the rights and remedies which the statute confers on the debtor himself, and is subjected to all the duties which by law devolved on his vendor. In order to

entitle the execution debtor to demand a reconveyance from the purchaser, the law makes it his duty to surrender the possession of the premises to such purchaser without suit, to tender him the amount of his bid, with ten per cent. per annum on the same to the time of the tender, with all expenses incurred, to pay the expenses of reconveyance, and to make such tender within two years from the time of sale.—Clay's Digest 502–3 § § 1, 2, 5; Sanford v. Ochtalomi, at this present term. A deficiency in either of these respects, unless satisfactorily excused by the bill, will be fatal to his cause; and as they are all necessary to entitle him to relief, they must be set forth in the bill itself.—Sanford v. Ochtalomi, *supra.*

Let us test this portion of the complainant's bill by these rules. The allegation with regard to the surrender of possession by McNaughton, the defendant in execution, is in these words; "that after he (complainant) became the owner of said judgment, and equity or right of redemption, McNaughton had left it," (the land,) and complainant took possession of it, as he supposed, and insists he had a right to do. The long established and well settled rule of pleading is, that the allegations of the bill must always be taken most strongly against the pleader; but it scarcely requires the aid of this rule to interpret this allegation as one of continued possession by McNaughton and the complainant, from the time of the sale to the time of filing the bill, and as it is not alleged that this possession was with the consent of the purchaser, we can but regard it as otherwise.—The bill sets out the sale as occurring on the first Monday in January, 1849, and the purchase of the equity of redemption by complainant as happening on the 14th of July of the same year; and no effort appears to have been made by the complainant to effect the redemption, until the 29th of October, 1850.—Thus, for nearly two years, McNaughton, and complainant under him, withheld the possession of the land from the purchaser, enjoying the rents and profits, without making any effort whatever to entitle themselves to such possession; and without surrendering the possession to the purchaser without suit, so as to entitle them, under the statute, to the privilege of redeeming.—These facts appear upon the face of the bill. At the threshhold the bill is found without equity, so far as the complainant claims through McNaughton, the judgment debtor.

But it is contended, that the fact that the defendant in execution did surrender the premises sold without suit, to the purchaser, need not appear in the bill, and that a failure to deliver such possession is wholly a matter of defence. We do not so regard it. Before the defendant in execution is entitled to redeem, he is required to deliver the possession, without suit, to the purchaser. It is as important that he should do this, as that he should tender the purchase money with the interest required by statute. In fact, *it is necessary to his right*, and whatever is so necessary must be alleged in the bill. The language of the statute, and the equity of such cases, both require that the purchaser should have possession of the lands, that he may enjoy the rents and profits in the meantime, since the sum required to be tendered by the statute embraces only the purchase money with ten per cent. interest, and it could not be tolerated that the defendant in execution should have the rents, when they often amount in value to a much larger sum than the purchase money and the interest required, and almost invariably to a larger amount than the ten per cent. interest.

It is said, however, that the complainant occupies the position of a creditor, and in that character has made out a case for relief. Although this fact is set forth in the bill, yet there are no allegations contained in it which seem to us to seek relief in that capacity. So far as they go, they appear to place the complainant in the relation of assignee of the right of redemption from McNaughton. There is no allegation that the complainant offered to refund to Meade, the purchaser, the sum bid at the sheriff's sale, with ten per cent. interest, and to credit the judgment which he held with an additional ten per cent., or a larger sum. This is required of a creditor by the statute, and an offer to do less will not authorize him to redeem. Nothing short of an offer of all that is required by the statute, will satisfy the demands of the law.—Clay's Digest 502 § 2; Smith v. Anders, 21 Ala. 782.

The views already taken of this case are fully decisive of it, and we deem it unnecessary to consider the other points made in the argument.

Let the decree be affirmed.

BEENE'S HEIRS *vs.* RANDALL'S HEIRS.

1. A married woman cannot dispose of her interest in real estate, except in the manner prescribed by the statute. (Clay's Digest 155 § 27.)
2. An answer directly responsive to the bill must prevail against the testimony of one witness, however full, clear and explicit, unless supported by corroborating circumstances which, when disconnected from the evidence of the witness, would tend to establish those charges which are denied by the answer, and would, of themselves, be evidence for that purpose.

ERROR to the Chancery Court of Dallas.

Heard before the Hon. JAMES B. CLARKE.

THE bill in this case was filed by the plaintiffs in error, who are the heirs at law and personal representatives of Jesse Beene, deceased, against the heirs at law of Willis Randall. It charges that said Randall, in his life-time, was seized of a certain tract of land; that his heirs at law are Caroline Jones, the wife of William E. Jones, Emeline Holt, the wife of Robert A. Holt, and Edward W. Randall; that in 1829 said Jesse Beene purchased said tract of land from Edmond Randall, the guardian of said Emeline and Edward W., and from said Jones, the husband and guardian of said Caroline, and received from them a bond, conditioned that they should convey to him the title of said heirs, when they became of age; that said Beene took possession of said land, paid the consideration in full, and continued in possession under said contract of sale for fourteen years; that said William E. Jones, for himself and wife, after she became of full age, and with her approbation, received her portion of the purchase money; that said Holt and wife, in like manner, received their portion, and settled in full for the same with the guardian of said Emeline; and that said Edward W. Randall also received his share; that said parties all well knew, at the time they received satisfaction, of the circumstances under which the sale to Beene was made, and of the existence of said bond for titles; that they all ratified and adopted said sale after they became of full age; that they nevertheless refused to make title to said Beene in his life-time, and to his heirs at law since his death; and that they have commenced suit to recover the land.

The prayer of the bill is, that the legal title to said land be divested out of Randall's heirs, and vested in Beene's heirs; or, if this cannot be done, that the land be sold, and the purchase money paid by Beene refunded, and that the suit at law be perpetually enjoined.

Publication was made as to Jones and wife, who were non-residents, and a decree *pro confesso* was afterwards taken against them. Holt and wife answered, denying that they ever authorized or ratified said contract, and that said guardian ever paid any money to them, or to their use, with their knowledge and consent, and setting up other matters, which it is unnecessary to state, as they do not enter into the opinion of the court.—Their answer concludes with a demurrer to the bill. Edward W. Randall also answered, denying that he ever ratified or confirmed the sale, and that he ever received any portion of the purchase money.

The testimony of one witness was taken by the complainants, of whose evidence the material portions are stated in the opinion of the court.

On the hearing, the Chancellor dismissed the bill without prejudice as to Jones and wife, and as to the complainants' right to set up, as a defence against any bill which the defendants or either of them might file to recover the mesne profits which had accrued during the life of said Jesse Beene, the purchase money paid by him for said land, so far as they could prove its receipt by them; and directed the costs to be paid out of the estate of Jesse Beene.

The decree of the Chancellor is now assigned for error.

J. P. Saffold, for plaintiffs in error.

J. W. Lapsley, *contra*.

GOLDTHWAITE, J.—There was no error in the decree of the Chancellor, so far as Holt and wife and Jones and wife are concerned, for the reason that the assent of neither Mrs. Holt nor Mrs. Jones to the sale was established. The land was theirs, and not their husbands'; and it is the policy of the law, that the wife is not to part with her real estate, but by her own consent, freely and voluntarily given.—Clay's Digest 155 § 27. It is said, however, that in this case the assent of the wife is to

be presumed; but, if it had been expressly proved, we do not think that would have been enough, for it is the improper influence of the husband, which it is the object of the law to guard against, and unless the evidence went farther, and proved her free assent, a court of chancery would not divest her title.—Even then it might not be enough, without her separate examination in the mode prescribed by the statute. But, independently of this ground, we do not see how the wife's assent can bind her, except upon the principle that she adopts the sale and makes it her own; but, if the law be that the agreement of a married woman is void, how can her assent to the contract vary the case, unless indeed her contract is made and acknowledged as the statute requires?

These reasons, however, do not apply to the other defendant, E. W. Randall; but as he denies that he ever authorized or assented to the sale, or ever received any portion of the purchase money, and as these denials are directly responsive to the bill, it is necessary, under the well established rule of evidence applicable to courts of chancery, that they should be outweighed by the testimony, that is, at least by one witness and corroborating circumstances. If we were at liberty to act upon the testimony of a single witness, we have it before us, full, clear and explicit, and in direct contradiction to the denials of this defendant; but we cannot disregard the rule; and the only question on this branch of the case is, whether the evidence of this witness is sustained by corroborating circumstances. As we have said, the witness proves clearly the assent of this defendant to the sale after he became of full age, and his receipt of his portion of the purchase money from his guardian, Edmond Randall, by whom the sale was originally made; and to his answers is attached a copy of the account of such guardian, in which he charges himself with the amount of $133 33, on account of lands sold in Alabama, a copy of the receipt given by the defendant, Randall, in which he acknowledges that he has received from Edmond Randall the whole estate which he held as his guardian, and also a bond of indemnity executed by him to the same person, to save him harmless from delivering the property to the defendant before he was of age. It is urged, that these exhibits take the case out of the rule, but we do not think so. When the law speaks of corroborating circumstan-

ces, which with a single witness may outweigh an answer, it means circumstances which, disconnected from the evidence of the witness, would tend to establish the charges made by the bill, which are denied by the answer. And if these circumstances would not, of themselves, be evidence for that purpose, or would be entitled to no weight in sustaining the bill, the answer must prevail. Applying this test to the present case, and taking the evidence of the witness to be true, without reference to the exhibits referred to, it is clear that they add nothing whatever to his testimony; and it is equally clear that, of themselves, they would not even tend to support the charges in the bill, which are denied. The account does not purport to have been made out by E. W. Randall, or to be signed by him. On the contrary, it was the account of the guardian, made out by himself. As independent testimony, it not only proves nothing against the defendant, but had it been offered as such, exceptions to it might well have been sustained. The receipt, or acknowledgment, that this party had received from Edmond Randall his whole estate, which the latter held as his guardian, places the complainant in no better condition; as the guardian has no power over the real estate of the ward, except so far as the rents and profits are concerned, (Genet v. Tallmadge, 1 John. Ch. 561,) and for that reason the receipt could not be held to include the amount of the purchase money of lands sold by the guardian. The bond of indemnity proves nothing whatever.

The views we have taken upon the merits render it unnecessary to consider the action of the court upon the demurrer, and are decisive upon the question arising on the prayer of the bill, that, in the event the titles of the heirs of Willis Randall cannot be decreed to the complainants, then the lands be sold and the purchase money refunded, as it is evident no decree can be rendered which, so far as Mrs. Jones and Mrs. Holt are concerned, might operate to divest them of their title; and as to the other defendant, their is a failure of proof.

The decree of the Chacellor must, therefore, be affirmed, the plaintiffs in error paying the costs of this court.

SHADDEN *vs.* STERLING'S ADMR'S.

1. A writ of error does not lie from the refusal of a probate judge to proceed with the settlement of the accounts of an administrator of an insolvent estate, to which he had been cited by a creditor, and his dismissal of the citation; if the judge improperly dismisses the citation and refuses to proceed, *mandamus* lies to compel his action.
2. After an estate is reported insolvent, the only vouchers for money paid out that can be allowed on settlement with the administrator are for the "last sickness and necessary funeral expenses," (Clay's Digest 192 § 2;) and if the court, on due notice to the creditors, states an account, giving the administrator credit for "receipts, vouchers and allowances" exceeding the amount of assets received by him, the settlement is unathorized by law, and the administrator may be again cited by a creditor of the estate to settle his accounts.

ERROR to the Court of Probate of Benton.

The record shows that the defendants in error, Whiteside and Griffin, were appointed administrators of the estate of John K. Sterling, deceased, in August, 1836, and that they returned an inventory of the estate in October of that year. On the 4th January, 1838, they reported the estate insolvent, which report was received by the court, and ordered to be recorded. The next entry, dated January 6, 1838, recites that the administrators had that day filed their accounts and vouchers for final settlement, and thereupon the court ordered publication to be made for forty days in the "Jacksonville Republican," requiring all persons interested in said estate to appear, &c., on the first Monday in March then next, "to show cause why said accounts and vouchers should not be allowed." It does not appear that any account with the administrators was audited and stated at that time, or at any previous time.

The next entry in the record, dated March term, 1838, is in these words:

"Horatio Griffin and Moses Whiteside, administrators &c., in account with the estate of John K. Sterling, deceased.

Amt. of sale, bill, notes and accounts $1309 98.

Same Cr.

By receipts, vouchers and allowances filed in office $1328 50."

(Signed) "C. A. GUNN, Judge C. C."

The next entry in the record, dated "in vacation, Oct. 31, 1848," is an order for a citation to the administrators, at the petition of James Shadden and John Crocheron, as creditors of said estate, requiring them to appear on Monday the 20th day of November then next, "and exhibit their accounts and vouchers as such administrators, that the same may be examined, audited and stated by the court for final settlement, according to the statute." It nowhere appears that the citation thus ordered was ever served on the administrators.

The next entry, dated November 20, 1848, recites that the administrators failed to file their accounts and vouchers on the day appointed, and it is therefore ordered that the clerk "reissue" a notice to them, requiring them to file their accounts and vouchers for a final settlement on or before the 18th of December next.

The next entry was made on January 5, 1849, at which time it seems the administrators appeared and filed their accounts for final settlement; the first Tuesday in March next was set for "said settlement," and publication ordered for forty days previously.

At the appointed day in March term, 1849, "the court, having examined all the papers presented by said administrators for the purpose of making said final settlement, has come to the conclusion that said settlement cannot be made at this time, and it is therefore ordered that this case be continued until the next term of this court, it being the first Friday in April next."

At the April term, 1849, the settlement was continued over without day, to allow the administrators time to collect some debts due the estate.

The next entry, dated "in vacation, January 23, 1850," shows an order made on that day, "upon the petition of McCampbell & Foster, attorneys for the creditors," requiring the administrators to appear on the second day of February next, and file their accounts and vouchers for final settlement.

"In vacation, February 6, 1850," as shown by the next entry, "came Moses Whiteside, one of the administrators," &c., "and filed his accounts and vouchers for final settlement;" and an order was made, requiring all persons to appear and contest said settlement on the 22d March following, and for publication of the order forty days previously.

On the said 22d March, 1850, "came McCampbell & Foster, attorneys for James Shadden, one of the creditors," &c., and also came the administrators. Thereupon the administrator read to the court the entry of January 4, 1838, aforesaid, at which time the estate was reported insolvent, the aforesaid entry of January 6, 1838, and the aforesaid entry of March term, 1838. The administrators then proved, by the publisher of the "Jacksonville Republican," that the notice for such final settlement was published in said newspaper for six weeks previous to said March term, 1838; to which proof said Shadden, by his attorneys, objected, but the objection was overruled, and he excepted. "Upon this proof, on motion of said Griffin and Whiteside, the court refused to proceed further in the premises, and dismissed the citation;" to which also said Shadden excepted.

The action of the court in dismissing the citation and refusing to proceed further with the settlement, is assigned for error.—The defendants in error move to dismiss the writ of error. In the event the motion to dismiss shall prevail, the counsel for Shadden pray for a rule *nisi* against the probate judge, to appear and show cause why a *mandamus* should not issue requiring him to proceed with the settlement.

Belser & Rice and John Foster, for plaintiff in error:

1. The matter can be reviewed in this court without a bill of exceptions. The order of the court dismissing the citation is sufficient to authorize the review.—Clay's Digest 229 § 42; Ashley v. Ashley, 15 Ala. 17; Willis v. Willis, 16 Ala. 655.

2. A creditor of an estate may file his petition in the Orphans' Court to compel a settlement and distribution of the assets of the estate.—King v. Shackelford, 13 Ala. 435.

3. The judgment of the March term, 1838, and the report of insolvency, were not sufficient to authorize the dismissal of the citation.—Ashley v. Ashley, 15 Ala. 17; Crothers v. Heirs of Ross, 17 Ala. 816; Willis v. Willis, 16 Ala. 656; Clay's Digest 226 § 27.

4. The action of the Orphans' Court at the March term, 1848, was altogether *ex parte*, informal, irregular and inoperative.—Willis v. Willis, 16 Ala. 657, and cases cited.

5. A *mandamus* is asked for, to compel the probate judge to

act in the premises; and this will be allowed, even if the writ of error is so defective that it cannot be amended.

J. B. MARTIN, *contra*:

1. The writ of error should be dismissed, because the refusal of the judge to proceed to a settlement is not such an order or decree as will sustain a writ of error.—Brennan v. Harris, 20 Ala. 185.

2. The writ describes a judgment which is not to be found in the record.

3. There is no judgment in the record.

4. The action of the court was void, being had in vacation.

5. The record does not sufficiently show that Shadden was a creditor, or, if a creditor, it is nowhere shown that his debt had been presented to the administrator, and he could not properly sue out a writ of error.—6 Ala. 166; 8 Ala. 177; 8 Porter 556.

6. All the creditors, or their names, should have been joined in the writ of error.—2 Stew. & P. 24; 7 Ala. 923.

7. The bill of exceptions is defective, in not appearing to have been signed as such in term time, and for the want of the judge's seal.—17 Ala. 143; 17 Ala. 700.

8. The report of insolvency gave the court jurisdiction of the estate as an insolvent estate, (Black's Creditors v. Black's Adm'rs, 20 Ala. 401;) and having obtained jurisdiction, its subsequent action, though abounding in irregularities which would reverse it on error, cannot pronounce it void.—6 Porter 262; *ib.* 219; 1 Ala. 708. The order or decree of March, 1838, was made by a court of competent jurisdiction, and was intended as a final disposition of the estate; and however irregular, it must be sustained, until reversed by a direct proceeding. Elliott & Wife v. Mayfield, 3 Ala. 223; Sankey's Distributees v. Sankey's Adm'r, 18 Ala. 713. A balance being found in favor of the administrators, no other order than the one which appears could have been rendered, according to various decisions of this court.

If the estate has not been properly reported insolvent, the creditors had no right to proceed in the Orphans' Court; and if it has been legally reported as such, then all the creditors should have joined.

If the judgment is void, because rendered at a time when no court could be held, neither the appearance nor consent of the parties could give the court jurisdiction.

PHELAN, J.—The refusal of the probate judge of Benton to proceed with the settlement of the accounts of Griffin and Whiteside, as administrators of Sterling, to which they had been cited by him at the instance of Shadden, one of the creditors, and the dismissal of the citation, is neither an interlocutory nor final order or decree from which a writ of error will lie. The writ of error will, therefore, have to be dismissed.—The case is not unlike that of Brennan v. Harris, 20 Ala. 185.

But a *mandamus* is prayed for in this event, and we are called upon to examine the grounds upon which the refusal to proceed with the settlement is placed by the probate judge, in order to determine the propriety of this application.

The refusal to proceed is based upon the two entries found in the record: 1st. That of the 4th of January, 1838, by which it appears that the administrators reported the estate insolvent, which report was received and ordered to be recorded; and 2d. That of March term, 1838, from which it appears that an account was stated with the Orphans' Court at that time, showing assets to the amount of $1309 98, and "receipts, vouchers and allowances" for a small amount over that sum, to-wit: $1328 50. This, together with the parol proof made March 22d, 1850, when the court refused to proceed further, that notice had been duly given by publication, previous to the statement of the account aforesaid in March, 1838, for creditors to appear for final settlement with the administrators at that term, makes the whole ground as shown by the record upon which the Probate Court dismissed the citation calling upon the administrators, at the instance of Shadden, to make a final settlement, and refused further to proceed.

The ground is not sufficient. The report of the insolvency of this estate, made by the administrators the 4th of January, 1838, and received by the court and ordered to be recorded, placed this estate in the care and jurisdiction of the court as an insolvent estate, to be settled up, and the assets distributed among the creditors accordingly.—West v. Clarke, 5 Ala. 117. The order then to be pursued, or, if nothing was done towards

a settlement until after the statute of 1843 (Clay's Dig. 192, *et seq.*) the order to be pursued after the passage of that law, will be found laid down in sundry decisions, (7 Ala. 923; 9 Ala. 925; 10 Ala. 915;) but more particularly in Steele v. Weaver, 20 Ala. 540, and Weaver v. Weaver, 20 Ala. 557.

We cannot find that anything was done to annul the report of insolvency which had been made, (even if that can be done in the same court;) and as long as that was in force, it was not in the power of the Orphans' Court, on a settlement with the administrators, to allow "receipts, vouchers and allowances," as it seems was done to the extent of $1328 50. The only vouchers for money paid out after a report of insolvency that can be allowed on settlement with the administrator, are for the "last sickness and necessary funeral expenses."—Clay's Dig. 192 § 2.

The settlement, then, or what purports to have been a settlement, with the administrators in March, 1838, if every thing else had been regularly done, which was not the case as far as this record discloses, was a settlement not authorized by law, because it was not conducted in the matter of allowing credits and vouchers as the settlement of an insolvent estate should be.

The case stands now, as it stood in 1838, as an insolvent estate under the care and jurisdiction of the Probate Court of Benton County, and it is the duty of the judge of that court, at the instance of any creditor or creditors, to cite the administrators to a settlement, and to proceed to final settlement with the administrators according to law; and when the amount in their hands liable to distribution is ascertained, to order distribution among the creditors as of an insolvent estate.

A rule *nisi* will be ordered to issue to the probate judge of Benton, in conformity with the foregoing views.

McGOWN *vs.* SPRAGUE ET AL.

1. Although the allegations of a bill are sufficient to bring the case within the act of 1846 giving attachments in chancery, yet, if the complainant fails to comply with its requisitions as to making affidavit and giving bond, his bill cannot be sustained under that act.
2. When a partner purchases his co-partner's entire interest in the firm, undertaking to pay all the partnership debts, and afterwards absconds, leaving his individual debts and those of the partnership unpaid, a court of equity will re-invest the retiring partner with his original rights as partner, giving him a lien on the partnership assets for the payment of the partnership debts. (Ligon J. *dissenting*.)

ERROR to the Chancery Court of Tuskaloosa.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by Henry McGown, the plaintiff in error, in behalf of himself and others, against his late co-partner, George Sprague, and others.

The bill alleges that the complainant and said Sprague, prior to the 4th day of February, 1850, were merchants and co-partners in the city of Tuskaloosa, doing business under the style of Sprague & McGown; that on the 4th February, 1850, the said firm was dissolved, the complainant selling out to the said Sprague his entire interest in the concern, and the said Sprague agreeing to pay all of the debts due and owing by the said partnership; that the goods on hand when complainant sold out his interest were worth about six thousand dollars, and the debts due the concern amounted to about twelve thousand dollars.—The bill sets out a list of the debts due by the firm at said dissolution, and also a list of said debts yet unpaid. It further alleges that, in the spring of the year after said dissolution, the said Sprague brought out from New York a new stock of goods, and mingled them with the old stock, but there yet remains distinguishable of the old stock, unsold, twenty-five hundred or three thousand dollars worth, and how many of the debts have been collected complainant cannot tell; that said Sprague continued the business in his own name up to within about a month before the filing of the bill, when he left Tuskaloosa for New York, ostensibly to buy goods; that the next day after he

reached New York, he left his hotel, and has never been heard from since, and complainant has good reason to believe, and does believe, that he has absconded for the purpose of avoiding the payment of his debts; that he has left no property behind, except the stock of goods on hand and the debts due to him from his customers, which, as complainant believes, are insufficient to pay his debts; that the goods on hand in the store, at the time said Sprague left, were worth, as complainant believes, about five thousand dollars more or less, left in the care of a clerk named John Cummings, aged about eighteen years; and that the said Cummings had that day closed up the store.

The bill alleges, on information and belief, that all or nearly all of the goods purchased by the said Sprague after the dissolution had been purchased on credit, and were still unpaid for; that if the goods be permitted to remain longer in the hands of Cummings, they will soon be seized by attaching creditors, and complainant fears greatly deteriorated amongst contending and conflicting creditors.

The bill prays that said Sprague be made a party defendant; that the bill be considered as filed in the complainant's own name, as well as on account of the creditors of Sprague & McGown and of the defendant Sprague, at least such of them as will make themselves parties to these proceedings; that a writ of attachment or seizure be issued, and the goods seized, with the books of the concern, and all the evidences of debt, and that the same be held subject to the further order of the court; that an account be taken, to ascertain what portion of the goods on hand belonged to the late firm of Sprague & McGown, and also what debts due to said firm remained uncollected; that the goods of the late firm of Sprague & McGown, if they could be ascertained, with such debts as were yet uncollected, due and owing to said firm, and such debts as have accrued to said Sprague by the sale of the goods of the old firm, be set apart and appropriated to the payment of the partnership debts of the said Sprague & McGown, and the balance to the individual debts of the said Sprague.

The bill is sworn to by the complainant, and an order for an attachment or writ of seizure is made, on the complainant entering into bond payable to the defendant in the sum of one thousand dollars. The bond was given, the attachment issued,

the goods seized and sold under a subsequent order of the court as perishable property, and the debts ordered to be collected.

Several of the creditors of the firm of Sprague & McGown, and also of George Sprague, intervene by petition, and make themselves parties to the proceeding under the prayer of the complainant's bill.

It seems that the register has in hand some nine thousand dollars, collected under the former orders in the cause. At the July term, 1852, the case was submitted for final decree, and for the distribution of the funds amongst the creditors. The Chancellor rendered a decree in the cause, of his own mere motion, dismissing the complainant's bill for want of equity.

The rendering of this decree is here assigned for error.

E. W. Peck, for plaintiff in error:

I. Before the passage of the act of the 5th February, 1846, this court held, in analogy to our attachment laws, that a complainant, in aid of his bill to enforce the payment of an equitable demand, might have, in a proper case, an attachment to seize and condemn the property of the defendant in the hands of a third person.—T. &. J. Kirkman v. Vanlier, 7 Ala. Rep. 226, 227; Davenport v. Bartlett & Waring, 9 Ala. Rep. 179.

This act is a remedial statute, and should be liberally construed. By it an attachment in chancery is given to enable a creditor, without first obtaining a judgment at law, to collect a legal demand against non-resident and absconding debtors, and also debtors who are fraudulently disposing of their property; and by the eighth section of said act, the remedy is extended in favor of accommodation endorsers and securities, if their principal is about to remove, or is removing, or absconding, or conveying off his property beyond the limits of this State, or disposing of the same, with a fraudulent intent.—Pamphlet Acts 1846, pp. 17, 18.

II. Now, in disposing of this case the complainant's bill is to be taken as true, and, being so taken, I maintain, that on the dissolution of the partnership between the complainant and the defendant, Sprague, and Sprague's undertaking to the complainant, as purchaser of the partnership property, to pay the partnership debts, as to those debts, and as between themselves, the complainant is to be taken as the surety merely of the de-

fendant Sprague.—Waddington *et al.* v. Vredenburg, 2 John. Cases 227, 228; Sedgwick on Measure of Damages 307, *et seq.*

If three persons give a note for their joint debt, each is to be considered as regards the others as a surety with regard to two thirds, and as a principal with regard to one third; and, if one be insolvent and another pay the whole debt, the third shall contribute a moiety.—Henderson v. McDuffie, 5 N. Hamp. Rep. 38.

The case of Reese and Heylen v. Bradford *et al.*, 13 Ala. Rep. 837, on which the Chancellor bases his decree, interposes no obstacle in the way of the complainant in this case, because his bill is filed under the act of the 5th of February, 1846, and as between himself and the defendant, Sprague, he is, under the facts stated in the bill, to be taken as the security of the said Sprague, as it regards the partnership debts; he is entitled to relief by the very language of the eighth section of said act.

III. The equity of this bill may be maintained upon the principle that the complainant is entitled to have the credits of the firm devoted to the payment of the firm debts, although by the sale of the goods themselves the lien and equity of the complainant was gone, yet as to the credits the sale did not vest the defendant, Sprague, with the legal title, but an equity only, as to them the legal title still remains in the firm, and the firm as to them still continues for the purpose of their collection, and when collected, they ought to be applied to the payment of the firm debts; this position is sustained by the authorities relied upon by the defendants cited from Story's Eq.

II. The equity of the bill may be maintained to prevent irreparable loss and mischief.

J. L. Martin, *contra:*

The bill is not framed under the act of 1846, as its allegations all show. Its whole scope and object is, to establish complainant's supposed lien on the partnership effects, derived from the existence of his former partnership with Sprague. It claims no debt against Sprague; it sets up a mere promise on his part to pay certain debts to other persons for which McGown was bound, and a failure to comply with his promise. Taking these allegations to be true, they only show a demand for unliquidated damages, recoverable at law.

The interposition of equity is invoked to secure complainant's supposed lien, in order that the goods may not be seized by attaching creditors, and in the struggle of creditors deteriorated, to the injury of complainant and others. This is wholly inconsistent with the course of an attaching creditor, who is seeking his debt through such means. Why this desire to preserve the goods from injury, if complainant claimed no other right in them than the payment of his debt by their sale?

The bill does not seek the goods and effects of Sprague generally, but is confined to the partnership effects, which complainant prays may be applied, not to the payment of the general creditors of Sprague, but to the creditors of the late firm of Sprague & McGown.

A bill framed under the act of 1846 must set up a debt due to complainant, or, under the eighth section, that complainant is endorser or surety for defendant to a particular amount, which, together with the existence of one of the causes for suing out an attachment, complainant must swear to, and must give bond in double the amount of the sum claimed. In all these particulars this bill is defective under the act of 1846.

GIBBONS, J.—The equity of the bill filed by complainant is attempted to be sustained by counsel on two grounds: first, under the statute of 1846, viewing the bill and the proceedings under it purely as a statutory proceeding; and secondly, it is insisted that the bill contains equity on its face independent of the statute.

Upon the first ground assumed, it is insisted that the relation which the complainant, McGown, held to the defendant, Sprague, after the dissolution of the partnership, and after the complainant had sold out his interest in the concern, was that of a surety for the payment of the partnership debts, and therefore the case falls directly within the eighth section of the act of 1846, and the complainant was authorized to proceed under the statute. This position we think well taken; but the bill does not seem to have been filed under that statute, as the proceedings under the bill are by no means in conformity with the act. The statute requires that the particular debt should be distinctly set out by affidavit, which is due to the complainant, or for which he is liable as security, and also that bond should

be given as in cases of attachment at law.—See section 3 of the act, p. 17, Pamphlet Acts of 1846. Neither the affidavit nor the bond seems to have been filed according to the requisitions of the statute; and, indeed, it does not seem to have been intended to be, at the filing of the bill, a proceeding under the statute. Where proceedings of this nature are authorized only by statute, the uniform decisions of this court are, that such proceedings, when taken, must be substantially conformable to the directions of the statute. These would seem to be too defective to be sustainable as such.

But it is insisted that the bill contains equity independent of the statute, and that upon the idea of preventing to the complainant irreparable loss and mischief. The chancellor, it would seem, considered the case made by the bill to fall within the case of Reese v. Bradford *et al.*, 13 Ala. 837, and dismissed the bill for want of equity, of his own mere motion. We do not consider that case as entirely decisive of this. If the complainant had been a creditor of the firm of Sprague & McGown, or of Sprague individually, the cases would then have been analogous, and the case cited would necessarily have controlled this. In that case, it is distinctly laid down as a principle, and is well sustained by authority, that "partnership creditors have no lien on the partnership effects for the payment of their debts; and they stand in respect to partnership property as individual creditors do to the property of individual debtors, without having any lien thereon, until their debt is reduced to a judgment creating a lien on real estate, or until execution is issued on said judgment creating a lien on the personalty." Story on Part. 509, 510. Partners, however, have a lien on the partnership effects, to pay the partnership debts.—*Ib.* It is said, however, that as McGown had sold out his interest in the firm to Sprague, the partnership no longer existed, and the effects of the late firm became by the act of sale individual effects; and therefore the lien of McGown, as a partner, to have the effects applied to the payment of the partnership debts, was lost by said act of sale.—Reese v. Bradford *et al.*, *supra.* This is doubtless true, and may all be conceded, and yet, we apprehend, the bill contains equity notwithstanding. When McGown sold out to Sprague, he did so on the agreement or undertaking of Sprague to pay the partnership debts, and to indemnify him

from all loss in consequence of said debts. Instead of performing the agreement, Sprague leaves the debts unpaid, becomes insolvent, and absconds, leaving also numerous individual creditors, who will, as complainant has the right to suppose, be anxious to realize their debts. Sprague's contract with him, then, not being performed, and circumstances having arisen by which its performance has become entirely improbable, has not McGown the right, as between himself and Sprague, to consider himself released from their contract, so far as it deprived him of a lien upon the partnership effects to have them applied to the payment of the partnership debts; and if the goods which he sold can yet be identified, and the debts which he assigned are yet uncollected, would not a court of equity reinstate him to his original rights, as a partner with a lien upon the partnership effects to have them applied as above stated? If these are correct propositions, then the bill contains equity in itself, independent of the statute. It sets out distinctly the contract of sale of the complainant's interest, the agreement on the part of Sprague to pay the partnership debts and hold the complainant harmless from all liability on account thereof, the failure of the said Sprague to perform the contract, the fraudulent absconding on his part with a view of avoiding the payment of his debts, and his insolvency. All these circumstances, taken together, we consider, give to the complainant an equity to be relieved from the effect of the contract of sale, so far as it deprived him of a lien upon the partnership effects to have them applied to the payment of partnership debts, and to be restored to his original rights as a partner with the lien above stated.—Carey on Part. 205; Deveau v. Fowler, 2 Paige 400; Kitchen v. Lee, 11 Paige 107.

It results from these views, that the decision of the chancellor in dismissing the bill for want of equity was erroneous, and his decree is therefore reversed, and the cause remanded, with instructions to proceed with the cause as upon a bill containing in itself a valid subsisting equity. It is further ordered that the costs of this court be taxed to the defendant Sprague, to be paid out of the funds in the hands of the register in the court below.

LIGON, J.—I will briefly state my reasons for dissenting from the opinion of the court in this case.

In the first place, I do not consider the allegations of the bill, and the manner in which it is filed, sufficient to bring it within the act of 1846, (Pamphlet Acts, 1845–6,) and consequently it is within the rule laid down by this court in the case of Reese & Heylin v. Bradford *et al.*, 13 A. R. 837, and was rightly dismissed by the Chancellor, unless it can derive some aid from the general lien which each partner has upon the partnership effects for the payment of the debts of the firm.

2. It is apparent from the face of this bill, that McGown and Sprague had fully dissolved their partnership several months before it was filed, upon an agreement that Sprague was to take the effects of the firm and pay all its debts. Upon making this agreement McGown retired from the partnership, and ceased to interfere in its concerns. Sprague continued the business in his own name, and paid a large portion of the firm debts. No fraud on the part of Sprague, either as to McGown, or the creditors of McGown & Sprague, in the purchase from McGown, as I understand its allegations, is charged in the bill. If under these circumstances, McGown has no lien as a partner, it is clear to my mind, that neither he nor the creditors of Sprague alone, or of McGown & Sprague, who have not reduced their claims to judgment, have the right to come into a court of chancery to charge the effects of Sprague with their payment.

The rule is, that when a firm is dissolved, by one partner selling his entire interest in the partnership effects to his copartner without fraud, and the selling partner retires from the firm on an agreement that the remaining partner shall pay the debts, the latter becomes the absolute owner of all the effects, discharged from the lien of the retiring partner.—Story on Partnership §§358, 359; Collyer on Partnership 603 to 605; *Ex parte* Ruffin, 6 Ves. 119, 124, 127; *Ex parte* Williams, 11 Ves. 3, 8; Campbell v. Miller, 2 Swanst. R. 552, 557; *Ex parte* Fell, 10 Ves. 347; *Ex parte* Peele, 6 Ves. 602.

As the retiring partner has no lien, the creditors of the firm, as it stood before his retirement, have none; for all liens which the creditors can have in case of dissolution must arise out of that of the retiring partner; and as we have seen that McGown has none, neither have the creditors of the firm from which he had retired. As a general rule, creditors, as such, have no lien

on the effects of a partnership for the payment of their debts.—See authorities, *supra*.

Both McGown and the creditors which he has joined with him in his bill, can be regarded in no other light than creditors at large, and in that capacity are forbidden to resort to a court of equity for the collection of their demands.—Reese & Heylin v. Bradford *et al.*, 13 A. R. 837.

For these reasons, I think, the decree of the Chancellor should have been affirmed.

SEAY *vs.* MARKS.

1. When the contract of hiring is reduced to writing, and is general in its terms, not restricting the employment of the slave to any particular business, the hirer has the right to employ him in any business to which slaves are usually put, not involving extraordinary peril to his life or health, or to re-hire him to another to be so employed; and parol evidence is not admissible to show that the employment of the slave was to be restricted to a particular business.
2. If the hirer re-hires the slave to another, and he is killed while engaged in a hazardous business not covered by the contract, even by inevitable accident, the owner may regard such misuse of the slave as a conversion, and recover his value from the first hirer, although the more immediate cause of his death was the slave's disobedience.

ERROR to the Circuit Court of Dallas.

Tried before the Hon. NATHAN COOK.

THIS was an action on the case by Marks, to recover for a tortious breach of the defendant's (plaintiff in error) duty arising out of a contract of hire of a slave named King, in these words:

"$170. On or before the first day of January next, we promise to pay E. W. Marks, or order, the sum of one hundred and seventy dollars, for the hire of King until the 25th day of December next, when he is to be returned, having first been provided with a summer and winter suit of clothes, hat, blanket

and pair of shoes; the said Marks to pay physician's bills. Given under our hands, this 1st day of January, 1852.

(Signed) JESSE J. SEAY,
JOHN COMPTON,
GEO. F. MARBERRY."

Parol evidence was admitted to prove that Seay hired the slave to assist in carrying on a livery stable. The boy was so engaged for some time, when he was hired by the agent or superintendent of Seay for a short time, to one Nance, to assist him in rafting lumber down the Alabama river, but without the knowledge or consent of Marks, the owner. Nance directed him to cross the river at a certain ferry in going after the lumber, but the slave disobeyed his order and went to another crossing, and in his effort to go over in a skiff, the wind being high, was turned over in the river, and with five others was drowned.

It was proved to be customary for persons who hired slaves to re-hire them out by the day or week, and this custom was known to the plaintiff when he let Seay have the slave.

The court charged the jury that, if the condition of the contract of hiring was, that the slave should be employed in the hirer's livery stable, and he hired him to Nance to raft lumber, and he was drowned while engaged in the latter employment, the defendant was liable; but, if there were no such condition, then the hirer was bound to exercise such ordinary care and prudence, as respects the life and health of the slave, as ordinarily prudent masters or owners of slaves take of them.

Other charges were asked and refused, but it is not deemed necessary to notice them.

The admission of the parol proof, and the charges based upon it, are assigned for error.

T. WILLIAMS, for plaintiff in error:

1. The fact of agency must first be established before the declarations of a supposed agent can be received.—Phil. on Ev. 79, margl. page.

2. The attempt to hire the slave King by the supposed agent, the day prior to the actual hiring by the principal himself, and the conversations of the supposed agent at the time he proposed to hire, are no evidence of what the contract of hiring was by

Scay himself; and therefore there was no proof of any hiring of King to be employed in and about the livery stable.

3. If, in the contract of hiring, the slave King was not to be employed in and about the business of the livery stable of Scay "exclusively," then it was a general hiring, (vide Hooks v. Smith, 18 Ala. 341,) and the hirer would not be liable unless for gross negligence.

4. If the contract of hiring the slave King was general, and not special, then trover would not lie, as there would be no conversion, (18 Ala. 341;) and the action would not lie until the end of the hiring.

5. Contracts for hiring must be construed and modified by the usages, customs and general understanding of parties in the place where they are made.—Taylor v. Andrews, 16 La. R. 15. The custom at this place of hiring was admitted to be for the persons hiring slaves for a year to rehire them by the day in occasional jobs, and this was known to Marks, the owner.

6. The note given expresses the contract, and being in writing, specifying what the hirer was to do, and what the owner was to do, parol evidence was improperly admitted to show a special hiring.—Hooks v. Smith, 18 Ala. 343; *ib.* 236.

7. It is not denied, that the misuser of a bailment subjects the bailee to an action of trover, because such misuser is a conversion; nor is it intended to be denied, that the general rule for damages in trover is the value of the property at the time of the conversion. But it is insisted that where the thing bailed is a slave, (as in this case,) and the injury is not the immediate or necessary consequence of the misuser, but the result of the voluntary and reckless act of the slave after the misuser, and this act in direct violation of and contrary to the express orders of the bailee, that then the damages is not the value of the slave, but only for the conversion; and where the conversion was only temporary, or for a short period, as one day, as in this case, the damages would merely be nominal, because all the authorities show the value of the property to be the amount of damages at the time of the conversion, because that conversion was the immediate cause of the actual loss or damage.

8. The hirer of a slave cannot be held liable for a loss or injury to the slave resulting from the recklessness or perverse will of the slave; for, in no case, is a master liable for the acts of

his slave, unless such acts are by the permission or command of the master.

W. M. Murphy, *contra:*

1. The court will observe that there is in the declaration a count in trover.

2. The hiring of this slave by Seay to Nance, in whose possession he was drowned, was a conversion of the property. The hiring is a personal trust, and not assignable; this is true as well with apprentices as slaves.—Tucker & Wife v. Magee, 18 Ala. 100.

3. In the last case cited, this court decide the law in relation to apprentices and slaves so far as to the personal trust to be the same. An apprentice is not assignable.—8 Mass. R. 299; 19 Pick. 556. The result is, that the refusal of the judge to charge that Seay was not liable unless Nance was guilty of gross negligence, is correct, as the hiring was of itself unlawful (to Nance) and was a conversion, as the slave was not assignable.

4. If Seay had a right to hire him to Nance, he had a right to hire him before the mast in the East India trade, and then throw the *onus* on Marks to prove gross negligence on the voyage.

5. As to the demurrer to the declaration that suit was prematurely brought, see Hooks v. Smith *et al.*, 18 Ala. 338.

6. As to right of defendant in error to introduce parol proof, see Brown v. Isbell, 11 Ala. 1021; West & West v. Kelly's Ex'r, 19 Ala. 353.

7. As to the declarations of the agent, Compton, see Williams v. Shackelford, 16 Ala. 318.

CHILTON, C. J.—We are of opinion that the Circuit Court erred in the admission of parol evidence to show that the slave, King, was hired to be employed in the business of livery stable keeping. The contract of hiring was reduced to writing: it was general in its terms, and authorized the bailee to employ the slave in any business to which slaves were ordinarily put, and which was not attended with extraordinary risk or peril to his life or health. This is the legal effect of the contract into which the parties entered, and which was reduced to writing. This

contract, as was decided in Nave v. Berry *et al.*, 22 Ala. Rep. 382, must be read as though the above provision was inserted in it; and to admit parol proof, showing that the slave was employed for a specific purpose, would be to give to the contract quite a different effect from that which the law attaches to it, and violates the familiar rule which forbids that a written instrument, which the parties have agreed upon as the exponent of their contract, should be varied, either as to its terms or legal effect, by parol evidence.

The case just cited seems to be conclusive of this against the admission of parol evidence. No difference in principle exists between them.

If the parties designed to give to the contract a more restricted operation, and to limit the employment of the slave in a particular business, they should have specified that in the writing, in which they have inserted other provisions as to what shall be done for him by the hirer. Not having done so, the hirer, we repeat, has purchased the right to employ him in any business to which slaves are usually put by prudent owners, not involving extraordinary hazard to the life or health of the slave. Such is the scope of the written contract in this case.

It is supposed by the counsel for the defendant in error, that the re-hiring by Seay to Nance, irrespective of the nature of the employment, amounted to a conversion; but we do not so regard it. The hirer, being the owner for the term, may re-hire the slave to another, being responsible to the owner for his proper treatment, and for his not being employed otherwise than is authorized by the scope of his agreement with the owner. If the agreement be general, as in this case, by which the hirer becomes entitled to employ the slave in any common or ordinary service, and he engages him in a business attended with extraordinary peril, such as could not be presumed to be in the contemplation of the parties at the time, or he hire him to another to be engaged in a hazardous business, and he is killed while thus employed even by inevitable accident, the owner may regard such misuse of the slave as a conversion, and recover from the person to whom he hired him the value of such slave.—Mullen v. Easley, 8 Humph. Rep. 428; Hooks v. Smith *et al.*, 18 Ala. Rep. 338.

It is also very clear, that if the slave is thus employed in

a hazardous business not warranted by the contract of hiring, it is wholly immaterial, so far as the right of the owner is concerned, how the injury or destruction of him is brought about, if the owner had no agency in producing it. So that, if in this case, the slave was hired to Nance to raft lumber upon the river, and such employment is attended with extraordinary peril, and is without the general and common business in which slaves are usually engaged, Scay would be responsible for his loss while so employed, although the more immediate cause of his death was the disobedience of the slave.--Duncan v. The Railroad Co., 2 Rich. Rep. 613; Hooks v. Smith, *supra*, and cases there cited.

It is unnecessary to prolong this opinion by an examination of the charges given and those refused. The case must be remanded, for the error in admitting the parol evidence limiting the hiring to the employment of the slave in the livery stable, and the principles of law above laid down, we trust, will be a sufficient guide in its future progress.

Judgment reversed and cause remanded.

PEARSON ET AL. *vs.* BAILEY.

1. When an agent lends out the money of his principal at a usurious rate of interest, the fact of the agency does not affect the illegality of the contract, or avoid the affect of the statute against usury.
2. If a contract is usurious in its inception, no renewal of the note, or other change in the form of the contract, can alter its original character, but the taint of usury follows it even into the hands of a *bona fide* holder, unless he receives it through the fraud of the maker.
3. If the borrower comes into equity for relief against a usurious contract, he will be compelled to pay the amount of the principal and legal interest thereon; and if the debt is secured by mortgage, the mortgage stands as a security for that amount.

ERROR to the Chancery Court of Tallapoosa.

Heard before the Hon. W. W. MASON.

The bill was filed by Francis E. Bailey, the defendant in error, against James M. Pearson, Mary Pearson, Matthew Lyle and Mary D. C. Lyle. It alleges that, in 1842, complainant borrowed $300 from said James M. Pearson, at 16 per cent. interest, and to secure its payment executed to him several notes, with two sureties, amounting in the agregate to $348; that said notes were payable on the 25th of December, 1842, some of them to said James M. Pearson, and others to John M. Pearson; that when these notes became due, or shortly afterwards, complainant paid said Pearson $100 in Alabama Bank bills, which were then passing at a discount of 25 per cent., and received a credit of $75 therefor; that the original notes were taken up in the Spring of 1843, and in their stead complainant executed others, with one of his former sureties as comaker with himself; that these notes were made payable to one John R. Slaughter, on Debember 25, 1843, and bore interest at the rate of 12½ per cent., amounting in the aggregate to $307; that Slaughter never possessed or owned these notes, but they were the property of James M. Pearson, and by him held and used; that on the 10th of October, 1845, after complainant had made several other payments on the notes, amounting in all to $70 or $80, he had another settlement with James M. Pearson, when it was found that the balance then due, including the usury, according to Pearson's method of accounting, amounted to $418; that the payment of this balance was then secured by the execution of two notes, each for $209, and a mortgage on a certain tract of land, containing a power of sale; that in December, 1847, complainant paid said Pearson $196 on these notes, and in February, 1848, the further sum of $25; that, upon a fair and legal accounting, complainant has more than paid off and discharged the amount of said original debt and the legal interest thereon; but said Pearson, claiming that a large amount is still due to him from complainant, has advertised said land for sale under said mortgage, and is proceeding to sell the same.

James M. Pearson was the only defendant to the original bill. The prayer is for an injunction against the proceedings under the mortgage, a cancellation of said mortgage, an account, &c.

The answer of Pearson admits the loan of the money at the

usurious rate of interest stated in the bill, but insists that the money belonged to Mrs. Lucy David, who resided in the State of Georgia, and who had left it in Pearson's hands to be loaned out on good security, and that this fact was known to complainant when he borrowed it; that Pearson, at the request of complainant, afterwards borrowed money from said Slaughter to pay Mrs. David, complainant agreeing to lose the discount; that afterwards, at the request of complainant, respondent borrowed from the executors of Wm. H. Pearson, deceased, money enough to pay said Slaughter, and transferred to them complainant's notes, payable to Slaughter, which thereby became assets of said estate; that on the division of said estate one of complainant's said notes was received by Mary Pearson, as guardian of Mary D. C. Pearson, who has since intermarried with Matthew Lyle, and that this note has been paid; that complainant's other notes were received by James M. Pearson, as his distributive share of said estate, and were afterwards given up to complainant, on the execution by him of two new notes for the amount then due, bearing legal interest, and secured by said mortgage with a power of sale; that these notes were afterwards, at the complainant's request, transferred by respondent to Mary Pearson, who had no knowledge of any usurious interest in the matter.

The bill was afterwards amended, and the other parties brought in. Many other facts appear in the pleadings and evidence, which it is not material to notice, as they do not change the nature of the case.

The Chancellor held the transaction usurious, and directed the master to state an account between the parties on the following basis: first, to ascertain the amount of money originally borrowed by Bailey from Pearson; secondly, to ascertain the amount paid by Bailey on this loan before the bill was filed, computing interest according to the statute, and deducting 25 per cent. from the sum paid in Alabama Bank notes.

From this decree, James M. Pearson and Mary Pearson prosecute a writ of error, and here assign for error:

1. That the court erred in refusing to dissolve the injunction;

2. That the court erred in refusing to dismiss the bill;

3. That the final decree is erroneous.

J. Falkner, for plaintiffs in error:

An agent is not bound by his acts, when they do not exceed his authority; but the principal is bound by them, and his acquiescence in them is evidence of the agent's authority.—Story on Agency §§ 147, 483; Boswell v. Clarkson, 1 J. J. Marsh. 49.

When a debt including usury is discharged, either by the payment of money, or by changing the liability to another, if done in good faith, the party cannot sue to recover back the money paid, and cannot defend for the usury in the hands of another person.

Where notes including usury are executed, if the payee trades them to a third person, and the maker then takes them up, and executes new notes for the debt, he cannot interpose the plea of usury to the new notes.—4 Paige's Ch. R. 530; 3 Ala. 158; Comyn on Usury (5 Law Library) 183.

Where a third person trades for a note, at the request of the maker, who represents to him that they are just, and that he has no defence against them, the maker will not afterwards be allowed to set up against him a defence which existed prior to the time when such representations were made.—Gil. Va. R. 42; 1 Equity Digest 662 § 67; Whitworth v. Adams, 5 Rand. R. 333; 4 Cowen's R. 266; 1 Story's Equity §§ 384, 385, 387, 388; 10 Johns. R. 195; 6 Munford's R. 541, 550.

B. J. Whatley, *contra:*

It matters not who may be the present owner of the mortgage debt, or who has heretofore been, as all the persons who ever had any interest in the debt are parties to the suit; and if James M. Pearson is now the true owner, as he sets up in his answer, he purchased with full knowledge of the fact that the notes were founded on a usurious contract.—Saltmarsh v. Tuthill, 13 Ala. 390; Churchill v. Suter, 4 Mass. 156; Powell v. Waters, 8 Cowen 669.

A note taken in renewal of a former note, which was void for usury, is also void in the hands of one who had notice of the usury.—Bridge v. Hubbard, 15 Mass. 96; Powell v. Waters, 8 Cowen 669. And no subsequent act, however formal and solemn, can give legal efficacy to a transaction which was void in its creation for usury.—Moncure v. Durmot, 13 Peters 345.

A mere substitution of another security for the one tainted with usury, does not take the case out of the statute.—Gibson v. Stearns, 3 N. Hamp. 185. If money be loaned on a usurious contract, and on maturity of the note it be punctually paid, and a new note, similar to the first, be given for the balance, such new note is void for usury.—Warren v. Crabtree, 1 Greenl. R. 167.

A mortgage taken on the loan of money, including a former usurious loan, is void; the taint of usury destroys the whole security.—Jackson v. Packard, 6 Wend. 415.

It is no defence to a lender on usury that he acted as an agent, unless the agency was known to the other party.—Wilkes v. Coffield, 3 Hawks' R. 28.

A usurious contract cannot be purged of the usury, by substituting a new security therefor.—Jackson v. Jones, 13 Ala. 121; Lloyd v. Pace, 12 *ib.* 637.

LIGON, J.—The questions intended to be raised by the first and second assignments of error, may all be considered under the third.

There certainly exists no reason why the Chancellor, at the hearing, or at any other period of the litigation in the court below, should have dismissed the bill for want of equity. Its allegations make out a clear case of usury, practiced through a series of years in every variation in the form of the contract between the parties; and we presume that no authority need be cited to sustain the jurisdiction of the Court of Chancery under such circumstances, and especially when we add the further fact, which appears by the bill, that the usurer, holding a mortgage security for his debt with the power of sale, is proceeding to sell the mortgage premises, when it is alleged that he has already received his principal debt with legal interest.

The answer of James M. Pearson, the principal actor in the usurious contract, does not deny the rate per cent which was agreed on between himself and Bailey when the loan was effected, as it is charged in the bill, but admits that it was stipulated that the borrower was to pay at the rate of 16 per cent. per annum for the loan, which was reserved in the notes given at the time; but he seeks to avoid the force of our statute against usury, by averring in his answer that the money loaned by

him to Bailey was not his own, but belonged to a Mrs. David in the State of Georgia, who had deposited it with him for the purpose of loaning out, and that he has been compelled to repay it to her. This, we apprehend, will not be allowed to change the nature of the contract; it is as clearly usurious when made by him under pretence of agency for another, as though he stood alone in making the loan to Bailey. In such case, the plea of agency can avail nothing, in removing the unlawful character from the transaction.

The law forbids the making of a usurious contract, and no one has the power to give authority to another to do an unlawful act. The parties, in such cases, are all principals.

But, in this case, it does not appear that Mrs. David ever directed James M. Pearson to lend her money on a corrupt and usurious agreement: his authority, according to his own showing, was to lend it out; and this must be held to mean only such loaning as is sanctioned by law. If he should go farther, and loan it on a usurious contract, he exceeds his authority; and if it is not afterwards sanctioned by his principal, and loss results, he is liable to her. But no consideration arising out of the relation of the principal and her agent would divest the loan of its usurious character, or deprive the borrower of his right to set it up against the lender, in any proceeding against him to enforce the illegal contract.

Neither does the renewal of the note, or change of the form of the contract, alter the character of the original transaction. Jackson v. Jones, 13 A. R. 121. If it is usurious in its inception, the taint abides in it, and will affect it throughout all its renewals and mutations, and follow it into whose hands soever it may go, unless the holder receives it through the fraud of the maker.

In this case, it is admitted, as well as proved, that interest at the rate of 16 per cent. per annum was contracted for at the making of the loan, and execution of the original notes. On the first renewal, 12½ per cent. per annum was agreed upon between the parties. The interest accruing at both these rates entered into the last notes of $208 each, which are secured by the mortgage, under which James M. Pearson was proceeding to sell when the bill in this case was filed. The mortgage itself is therefore tainted with usury, and cannot be allowed to stand as

a security for any more than the balance (if any) really due on the original debt, and 8 per cent. per annum interest thereon. Jackson v. Packard, 6 Wend. 415. This sum must be ascertained by deducting the payments, and computing the interest by the rule prescribed in the statute.—(Clay's Digest 283 § 1.) At law, the recovery could only extend to the principal debt, without interest; but when the borrower comes into chancery for relief, as he seeks equity, he will be made to do equity by paying the principal, with legal interest.

If, on this accounting, it should be found that a balance is due the lender, the mortgage must stand as a security for that balance only. If nothing is found due, the mortgage should be cancelled, or a perpetual injunction should go against all proceedings on both the notes and mortgage.

It is, however, insisted that Mary Pearson is the holder of the notes secured by the mortgage, without notice of the corrupt agreement with which they are tainted. This does not, of itself, deprive Bailey of his right to set up the usury against her. Something more is required before this result will follow. Although the answers are artfully obscure as to the manner in which these notes came into her possession, still it does not fairly appear, either by them or the proof, that Bailey had any connection with her receiving them, and certainly no such connection as will estop him from relying upon the usury against her. She cannot, therefore, be allowed to stand on higher ground with respect to them, than James M. Pearson, the payee, and there can be no doubt, that, as between him and complainant, the notes and mortgage are void, except as a security for the balance of the principal debt, and legal interest.

Such was the conclusion of the Chancellor, and his decree is consequently affirmed.

On the final hearing, the bill should be dismissed as to Lyle and wife, who disclaim all interest, and have taken no active part in the defence.

Let the costs, both of this court and the court below, be paid by James M. Pearson.

BOGLE ET AL. *vs.* BOGLE'S ADM'R.

1. An administrator may discharge himself by showing that he delivered to his successor the assets of the estate which remained in his hands unadministered, and the admissions of the latter are competent evidence to prove that fact.
2. The action of the Probate Court under the act of February 11, 1850. (Pamphlet Acts 27,) upon questions of fact growing out of administrations, is a matter of law, and is revisable in the Appellate Court in the same manner as the decisions of the court on questions of fact which are referred to the court rather than to the jury; in such cases the Appellate Court will look to the whole evidence, if it is to be found in the record, and will not send the case back for another trial, if enough remains to sustain the judgment, rejecting testimony which may have been illegally admitted.
3. Where the widow purchases property at the administrator's sale, giving her notes for the purchase money, and afterwards marries again, and her husband takes out letters of administration *de bonis non*, he becomes chargeable with his wife's debt to the estate.
4. After a lapse of eighteen years the court will not force conclusions, nor draw any inferences not clearly warranted by the evidence, in favor of a distributee who has had ample time and opportunity to assert his rights and has made no effort to do so until after the administrator's death.

ERROR to the Court of Probate of Dallas.

THE record shows that Samuel H. Bogle was appointed administrator of the estate of James Bogle in 1826, that as such administrator he procured an order for the sale of the personal property, and his return of the sales, the inventory and appraisement. The record further shows that in 1832 John D. Haynes, having married the widow of James Bogle, and being appointed guardian for the minor heirs, instituted proceedings in the Orphans' Court against said Samuel H., as administrator, for a distribution of the estate, which proceedings were subsequently discontinued. The record also shows that in September, 1832, an application on the part of such administrator was made for a final settlement of the estate, and an order of publication directed to be made; but the record does not show that any settlement was made, and in July, 1851, John D. Haynes was appointed administrator *de bonis non*. In June, 1851, on the application of John G. Levitt, and proof

that said Haynes had removed out of the State to parts unknown for more than fifteen years, the letters granted to him were revoked, and said Levitt appointed administrator *de bonis non.*

In July, 1851, Samuel H. Bogle having died, his administrator, Thomas W. Walker, applied for final settlement of his intestate's administration on the estate of James Bogle, under the act of January, 1845. An issue was made up between the plaintiffs in error on the one side, and the defendant in error on the other, the latter pleading, in effect, that his intestate, Samuel H. Bogle, had before his death fully administered and settled said estate; and upon this issue the cause was tried by the court.

On the part of the plaintiffs there were introduced the records from the Orphans' Court showing the appointment of the intestate as administrator in 1826, the appraisement, inventory and orders authorizing him to sell the personal property, as also the account of the sales of the personal property as returned by him; also the same records showing that in 1831 he applied to make a final settlement of the estate, and renewed the application in September, 1832, when an order of publication was made. The plaintiffs proved the value of the hire of the slaves belonging to the estate of James Bogle from 1826 to 1834, when they were received by John D. Haynes, the administrator *de bonis non.*

The material portions of the evidence on the part of the defendant, and the objections to the same, so far as any legal question is presented upon them, will be found in the opinion of the court. The court below upon the facts proved gave judgment in favor of the defendant.

The rulings of the court upon the testimony, and the judgment rendered, are here assigned for error.

Wm. M. Murphy and J. W. Lapsley, for plaintiffs in error.

George W. Gayle, *contra.*

GOLDTHWAITE, J.—We think the court committed no error in overruling the objections taken on the trial below, by the plaintiffs in error, to the admissions of Haynes, the administrator *de bonis non.* These admissions were made by him while

acting in that capacity, and were to the effect that the intestate, Samuel Bogle, had made a settlement of the estate with him. The law is settled in this court, that the administrator may discharge himself by showing that he delivered to his successor the assets of the estate which remained in his hands unadministered, (Skinner v. Frierson, 8 Ala. 915; Gayle v. Elliott, 10 Ala. 264;) and the admissions of Haynes, if they were legitimate evidence, tended to establish that fact. It is true, that an administrator cannot create a charge against the estate, either by his act or admission; but this evidence is not of that character. Haynes, by virtue of his appointment, had authority to receieve from the former administrator the assets which remained with him unadministered, and as his receipt would have been competent evidence of that fact, so his admissions made while he was administrator, tending to establish the same fact, were upon the same principle admissbile.—Starke & Moore v. Keenan, 5 Ala. 590; Pharis v. Leachman, 20 Ala. 662.

We consider it unnecessary to inquire into the rulings of the court upon the other portions of the evidence. Much of it was illegal, but if it had all been rejected, we think enough remains to sustain the judgment of the court; and as under the act of 11 February, 1850, (Pamphlet Acts 27,) it is the duty of the court to decide questions of fact, growing out of administrations, without the intervention of a jury, unless upon the application of one of the parties, it follows that its action upon the whole evidence is a matter of law, and revisable here in the same manner as the decision of the court upon questions of fact arising upon a trial in the common law forums, which are referred to the court rather than the jury; as where the competency of a witness is to be determined, the loss of a writing, or other questions of a like character. In these cases, this court will look to the whole evidence, if it is to be found in the record, and will not send it back for another trial, if enough remains to sustain its judgment, rejecting testimony which may have been illegally admitted.

Applying this rule to the case before us, we find the slaves belonging to the estate of James Bogle are proved to have remained in the possession of the widow, from the time of his death until her marriage with Haynes, and from that period in his possession; that much the greatest portion of the other

personal property was bought at the sale by the widow, and the note given by her, which was offered in evidence, it is fair to presume from its bearing date within a few days after the sale was made, was given by her for the purchases made on that occasion. The fact that this and other notes made by Haynes, payable to Samuel H. Bogle, as administrator of the estate, were retained in the possession of the latter, is not important, as they could not have been collected by him after Haynes took out letters, (Durham v. Grant, 12 Ala. 105,) and by his marriage with Mrs. Bogle, and taking upon himself the administration, Haynes became chargeable with these debts.—Childress v. Childress, 3 Ala. 752; Duffie v. Buchanan, 8 Ala. 27. That these notes were placed in the hands of an attorney for collection, would militate against the idea of a full settlement, if it was shown to have been after the settlement was had. The evidence does not establish at what time this was, and it is not to be presumed that it was after Haynes took out letters, as no action could have then been sustained upon them. The main facts, that Haynes was in possession of by far the greatest portion of the property belonging to the estate, and that after a bitter controversy, in which he, as the representative of all the distributees, endeavored to force the intestate of the defendant to a distribution of the estate, he admitted that he had a settlement with him, are, we think, sufficient under the circumstances to sustain the judgment. The relative position of Haynes and Samuel H. Bogle gives to the admission of the former great weight, and authorize it to be taken in its broadest sense; and although the lapse of time may not, of itself, be sufficient to create the legal presumption of a settlement, we are not disposed, after a period of eighteen years has passed, to force conclusions, or even to draw any inferences not clearly warranted by the evidence, in favor of a distributee who has had the most ample time and opportunity to assert his rights, and has made no effort to do so, until after the death of the party. He is entitled to no favor under such circumstances.

We all agree that rejecting all the evidence objected to, except that which we have decided was admissible, enough remains to sustain the judgment, which must be affirmed.

WOOLFORK'S ADM'R *vs.* SULLIVAN.

1. A *bona fide* purchaser for valuable consideration at a public sale by an executor *de son tort* acquires at least a possession and right of possession, which he can maintain against all the world except the legal representative of the decedent, and as against him an actual possession of which he can only be deprived by suit.
2. An executor or administrator has power under our statutes to compromise or settle without suit the choses in action belonging to the estate.
3. When the evidence is conflicting on a question of fact material to the defence, the plaintiff is not entitled to a charge asserting his right to a recovery on the whole evidence.

ERROR to the Circuit Court of Pickens.

Tried before the Hon. THOMAS A. WALKER.

DETINUE by Alfred E. Going, as administrator *de bonis non* with the will annexed of Thomas Woolfork, deceased, against William Sullivan, for two negro slaves. The pleas were *non detinet* and the statute of limitations of six years.

On the trial, plaintiff proved the appointment of Ehud Nosworthy as administrator with the will annexed of said Woolfork in December, 1843, and his own appointment as administrator *de bonis non* on the 26th December, 1848; that said Woolfork owned said slaves at the time of his death in 1840, that they were demanded before suit brought, and their value.

The defendant then offered in evidence the record of the appointment of Nosworthy as administrator, the record of Woolfork's will, and its probate. The will is in these words: "I give my wife everything I possess during her widowhood; if she marries, she is to have third; not to give security when she qualifies, unless she marries, then to give security immediately. Given under my hand this 14th July, 1840;" and was duly signed and attested. Plaintiff objected to the admission of the will and its probate, as being irrelevant to the issue; but his objection was overruled, and he excepted.

Defendant then offered in evidence a transcript of the appraisement of property "shown to the appraisers as property of said Woolfork's estate by Nosworthy, the administrator, containing this item under the head of "debts due the deceased:"

"By John McKinney, one note, due 29th April, 1843," which was admitted by the court "as evidence to show that the note given for the negroes was received in due course of administration by the first administrator in chief." Plaintiff objected to the admissibility of said transcript, as being irrelevant and immaterial to the issues; but his objection was overruled, and he excepted.

Defendant then offered to prove that Elizabeth Woolfork, the widow of the said Thomas Woolfork, deceased, although she had never qualified as executrix, after having given notice of the time and place of sale in January, 1841, holding herself out as executrix, sold the slaves in controversy at public auction, and that one John McKinney became the purchaser, for the sum of $723, which was their full value. To the admission of this evidence the plaintiff objected, because it was wholly irrelevant and immaterial to the issue, and could not legally affect the rights of the parties to this suit; but the court overruled the objection, and plaintiff excepted.

Defendant then introduced a bill of sale for said slaves from Mrs. Woolfork to one Dempsey Bonner, after having proved its execution, and shown that it was executed to said Bonner instead of said McKinney by agreement between them; and an assignment endorsed on it by said Bonner to the defendant. Plaintiff objected to these papers, on the ground of irrelevancy; but his objection was overruled, and he excepted.

Defendant then produced a note for $723, made by said John McKinney, payable to said Elizabeth Woolfork as executrix of Thomas Woolfork, deceased, dated January 15, 1841, and proved that it was the note given by said McKinney for the purchase money of said slaves. Plaintiff objected to its admission as evidence, because of irrelevancy; but the objection was overruled, and he excepted.

Defendant further offered to prove that said John McKinney had paid to one Bartley Upchurch, who was the agent of Mrs. Woolfork, the full amount of said note, except the sum of about $105, and for this balance had given a new note; and that after the appointment of said Nosworthy as administrator said Upchurch had a settlement with him, as such administrator, and passed over to him said new note as a part of the assets of the estate. Plaintiff objected to this evidence, on the ground of

irrelevancy; but his objection was overruled, and he excepted.

Defendant further offered to prove that said Nosworthy, as administrator of Woolfork, collected said note from McKinney, knowing at the time that it was a part of the purchase money for said slaves. Plaintiff objected to this evidence, his objection was overruled, and he excepted.

It was further proved that Nosworthy, at the time of his said settlement with Upchurch, knew that said slaves had been sold by Mrs. Woolfork, and that said note for $105 was for a part of the purchase money; that the proceeds of that note constituted the only portion of the proceeds of said sale ever received by said Nosworthy; that all the balance of said note for the purchase money had been collected by Upchurch before the appointment of Nosworthy as administrator, and about $425 of the proceeds applied in payment of debts contracted by said Thomas Woolfork in his life-time, and $295 applied in payment of debts contracted by Mrs. Woolfork after his death for the use of the family; that a regular account current was made out by Upchurch at the time of said settlement, and full settlement was made, with the understanding that any mistake should be corrected; that Upchurch then passed over to Nosworthy the note above referred to, and between $200 and $300 in cash, the proceeds of the property, and Nosworthy gave him a receipt therefor, but gave him no release or discharge from any liability which he might be under for having intermeddled with the estate of said Woolfork.

There was some proof tending to show a final settlement and satisfaction between Nosworthy and Mrs. Woolfork for her sale of the property, but as to this it was doubtful. It was also shown that Mrs. Woolfork married in the fall of 1843, and that said Thomas Woolfork left six or seven children living at the time of his death, some of whom were still living. There was also some other proof in relation to the value of the slaves, and this was all the evidence in the cause.

The court charged the jury, that the sale made by Mrs. Woolfork of the slaves in controversy was a nullity and void, but the administrator in chief, Nosworthy, after he was duly qualified, had the right to waive the tort, and sue Mrs. Woolfork for the money; and that having this right, he had also the right to receive their value from Mrs. Woolfork or her agent,

Upchurch; and if the jury believed from the evidence that said Nosworthy, as such administrator in chief, had received from said Upchurch, or from McKinney, or from both, full satisfaction for the value of said slaves, then plaintiff cannot recover in this action. To this charge plaintiff excepted.

The plaintiff requested the court to charge, that, if the jury believed from the evidence that the whole amount for which said slaves were sold by Mrs. Woolfork was not actually paid in cash to said Nosworthy, the administrator in chief, although they might believe that a settlement of the claim was acknowledged to have been made by Nosworthy to Upchurch, in whose hands the money was, it would not amount to a satisfaction which would authorize a verdict for the defendant. This charge the court gave, but with this qualification: "that a mere acknowledgment of satisfaction was not sufficient, but there must be an actual satisfaction in cash or its equivalent. If the jury believe from the proof that a part was received in money from Upchurch, and a part in the note of McKinney, the purchaser of the negroes, which was afterwards paid to Nosworthy, and the balance was in discharge of debts against the estate of Thomas Woolfork, deceased, which Upchurch had paid as the agent of the widow, and these vouchers were taken by Nosworthy in due course of administration, then plaintiff cannot recover." To this qualification of the charge the plaintiff excepted.

Plaintiff further requested the court to charge the jury, that, if they believed the evidence in the case, they must find for the plaintiff; which charge the court refused, for the reason that there was some conflict in the evidence as to whether full satisfaction was received by the administrator for the slaves sued for.

The errors assigned are: 1. In admitting testimony against plaintiff's objections, as shown in the bill of exceptions; 2. In refusing to charge as requested by plaintiff, and in giving the charges excepted to.

S. F. Hale and J. L. Martin, for plaintiff in error:

1. The admission of irrelevant testimony against the objection of the adverse party, is error.—9 Ala. 534; 4 Ala. 40.

2. The title to the personal estate of a deceased person vests in his personal representative when appointed, and has relation

back to the death of the testator or intestate; and a sale thereof, if made by any other person, or even by the personal representative otherwise than as provided by statute, is void, and confers no rights upon the vendee.—12 Ala. 532; 15 Ala. 707; 9 Ala. 912; 4 Ala. 443; 12 Ala. 298; 10 Peters 161; 4 Munford 174; 4 Harr. 168; 18 Ala. 828. The estate cannot be divested of title in any other way than as provided by law. 1 Howard's Miss. R. 561.

3. In an action of detinue, the legal title only is in controversy; and the only inquiry in this case is, has the estate of Woolfork been divested of the legal title to the slaves in controversy. The equitable rights of the parties cannot be regarded.—14 Ala. 182; 6 S. & M. 78.

4. If the administrator in chief, Nosworthy, had sold these slaves otherwise than as provided by statute, although he had received the whole amount of the purchase money, and appropriated it in due course of administration, the sale would have been void, and the purchaser would have received no title.—4 A. 443. He cannot, then, affirm and make valid the act of another which is contrary to law, and therefore void, and which he himself could not have done.—12 Ala. 532.

5. Admit that an administrator in Alabama has all the powers of an administrator at common law, and can do all the acts which such an administrator might do, except in so far as he is inhibited by statute; yet, this admission does not benefit the defendant, for, as above said, the title to the personal estate of a decedent vests in his personal representative when appointed, and has relation back to the death of the decedent. The slaves in suit were in the possession of Woolfork at the time of his death, and were therefore not a chose in action, but a chose in possession, the title to which vested in the administrator on his appointment; and the very thing which the statute forbids is the divestiture of this title out of the estate by the administrator, otherwise than as provided by statute.

In the case of Carpenter v. Going, 20 Ala. 587, this court decided, that the receipt of full satisfaction by the wrong-doer, who had improperly disposed of property belonging to the estate, and the application of the amount so received to the payment of the debts of the estate in due couse of administration, did not divest the title of the estate to the property. It is ad-

mitted that the wrongful sale does not divest the title, and the above case shows that the receipt of satisfaction by the estate is equally ineffectual for that purpose. And in 4 Ala. 443, this court decided, that, where the administrator himself had committed the wrong, by a sale of the property of the estate otherwise than as provided by law, and received the full value of the property in satisfaction of that wrong, and appropriated it in due course of administration, yet the estate was not divested of the legal title to the property. It is certainly impossible to conceive how the act of the administrator in receiving satisfaction for the wrong of another can be more potent in divesting the title of the estate which he represents, than the same act of his in receiving satisfaction for a like wrong done by himself.

E. W. Peck, *contra :*

Administrators in this State have all the powers of administrators at common law, except where their powers are regulated and limited by our statutes. By the common law, they might sell the estate of their intestate at private sale. By our statutes this power is taken away, but for injuries done to the estate all their common law rights and remedies remain unaffected by our statutes.—Upchurch v. Norsworthy, 15 Ala. 705, 707.

The sale of the slaves sued for, made by the widow of the deceased, was void. It was a wrong done to the estate—a conversion, not by the widow only, but by the purchaser. On the appointment of Nosworthy, the administrator in chief, the title vested in him, notwithstanding said sale ; yet, inasmuch as they were then in the possession of the defendant, claiming to hold them under a purchase made in good faith from the first vendee, the right of the administrator in chief was a right of action merely, (10 Ala. 819 ;) and although, if in possession, he could not have sold them without complying with the regulations of the statutes in such cases, yet, as the possession was in fact in another, and he only had a right in action, this right he might enforce by suit, or settle without suit ; and either course, when it resulted in a satisfaction as to these slaves, would be an administration *pro tanto* of the estate, and therefore the title to them, by operation of law, would in such case pass out of the administrator, and vest in the party in the possession.—1 Williams on Executors 508-9 ; Upchurch v. Norsworthy, *supra ;* Beattie v. Abercrombie *et al.*, 18 Ala. 9, 18, 19.

An administrator may submit a claim of the estate to arbitration.—Alling v. Munson, 2 Conn. 694, 696; 1 Brock. R. 230, 231. He may, also, release all personal claims of the estate, compound them, &c.—18 Ala. R. *supra*, 19; 2 Conn. R. *supra*, 696. And if, in such cases, he act in good faith, he will not be subject to liability to any one; but if he do not, and the estate be thereby injured, he may be liable to the creditors or distributees as for a *devastavit*, but not to the administrator *de bonis non*, for the administrator *de bonis non* is only entitled to the goods and chattels, rights and credits, of the intestate that remain unadministered by the administrator in chief.

The plaintiff insists, that if Nosworthy, the administrator in chief, had sold the property, but not in the way authorized by the statute, the vendee would have acquired no title by such sale. The admission of this proposition can do the plaintiff no good, because it stops short of the principle on which the defence in this case rests. But suppose, after such sale, and after the appointment of the plaintiff as administrator *de bonis non*, he had elected to waive the tort, (and this he might have done on the authority of Upchurch v. Norsworthy, adm'r, *supra*,) and had settled with the purchaser, and received the value of the property in satisfaction of his claim, and then had resigned without finally closing the administration, and another administrator *de bonis non* had succeeded him, could such second administrator *de bonis non* have brought his action and recovered the property, after such settlement and satisfaction? Certainly not; he would be barred by the act of his predecessor. The case in hand is, in principle, the very case supposed.

The proposition of the plaintiff depends mainly on the case of Hopper v. Steele, 18 Ala. 828. The decision in that case is the decision of a divided court—the late Chief Justice dissenting, and Judge Parsons agreeing with the opinion of the present Chief Justice, from a supposed necessity imposed on him by the decision in Swink's adm'r v. Snodgrass, 17 Ala. 653.

Although it is unnecessary in this case to come in conflict with the case of Hopper, adm'r, v. Steele, yet, I am persuaded that that case goes beyond the true limits of the principle upon which it is based. Every principle hath its limits. Truth and error have ever lain side by side, and many a sincere inquirer after truth, from the want of due caution, or led astray

by false lights, or in the ardor of the pursuit, hath run beyond the boundaries of truth, and fallen into the meshes—been entangled, overcome and taken, by the deceits and subtleties of error, and remained a captive all his days.

PHELAN, J.—Where an executor *de son tort* has sold at public sale the personal property of a testator, and an administrator is afterwards appointed, what right or interest in respect to such property vests in such administrator? and what are his powers and duties in reference thereto by the laws of Alabama? These are the questions presented for our decision by the case at bar.

The sale of the personal chattels of a testator by one who usurps the office of executor whether wilfully or ignorantly, and who is styled executor *de son tort*, is unlawful, whether it be public or private, and conveys to the purchaser no title. That is clear. Hence the sale by Mrs. Woolfork conveyed no title to the slaves in controversy, and was a conversion of the property of the estate, in her and her vendee. Still it conveyed what she had, the possession. Being in possession as widow, (for she was widow and sole legatee,) and holding herself out as executrix, she advertised and sold this property as such at public sale, and McKinney, defendant's vendor, became the purchaser, in good faith and for a full consideration. There cannot be any doubt that he acquired thereby at least a possession and a right of possession, which he could maintain against all the world except the administrator of Woolfork. He is surely in no worse condition than a vendee from an administrator by a private sale, which the statute expressly forbids, and which our courts have repeatedly pronounced to be absolutely void.—Clay's Digest 223 § § 13, 14; 4 Ala. 442. And yet such a vendee will be protected in his possession against every one but the administrator *de bonis non*. Even the administrator himself who made the sale cannot reclaim the possession, for he is estopped by his acts from the right to sue, (Pistole v. Street, 5 Por. 64,) and an execution against the goods and chattels of the testator cannot be levied on the property so as to take it.—4 Ala. 442, *supra*.

We are then constrained to hold, that a *bona fide* purchaser, for a valuable consideration, at a public sale made by an execu-

tor *de son tort*, aquires a right of possession in a personal chattel which he may maintain and defend against every one but the proper legal representative of the testator; and that, furthermore, he acquires an actual possession as against him also, of which he cannot be lawfully deprived against his will except by suit.

The necessary conclusion from these premises is, that the interest or right which an administrator acquires under such circumstances is a right of action only, what is called a *chose in action*, when we mean to speak of it as property, as something that has value, like a promissory note in its general nature, though differing in some respects.

2. The question now remains, What are the rights and powers of an executor or administrator respecting the *choses in action* of his testator or intestate? Can he compromise or settle them without bringing suit?

We do not understand the doctrine to be questioned on either hand, that an executor or administrator in this State has all the rights and powers which he has by the common law, except so far as those rights and powers have been modified or abridged by statute.

But the power of an executor or administrator to compromise actions pending in favor of, or rights of action belonging to the testator or intestate, by the common law, if done *bona fide*, is not denied, and this power has not been affected by statute in Alabama. It can hardly be insisted that the statute (Clay's Digest 223 § 13) which directs the mode in which executors and administrators shall proceed to effect a sale of the "personal estate of any testator or intestate," and directs that it shall be done publicly, and at a certain place and within certain hours, was intended to embrace the notes and bonds or open accounts due to a testator or intestate. Such a thing has never been heard of in the country. Much less could it have been intended to relate to choses in action, whose value would be still more obscure at a public sale. It follows that an executor or administrator in this State has the power in question, and by necessary consequence the right, to this extent, at least, to transfer by private sale or contract the choses in action over which this power to compromise and settle without suit exists; for what is the release of an action already begun, or the transfer of a right

of action, but a private sale of the benefit or interest to be derived from it?

Following up these conclusions we may say, the sale of these slaves by Mrs. Woolfork was an unlawful conversion of the property of the estate; yet, by the transaction McKinney was invested with a possession, which could not be lawfully taken away except by suit. No execution could be levied on them as the property of Woolfork, the testator, and it would amount to a trespass for any to attempt to take them by mere force.—When Nosworthy was appointed administrator of Woolfork, he had in respect to these slaves nothing left in him but a right of action, with several modes of prosecuting that right, either of which he might pursue; detinue or trover against the person in possession; trover against the widow Woolfork, or, if the purchase money had been received by her, or her agent, of McKinney, he might waive the *tort* and bring an action against her for that amount of money of the testator had and received to his use.

Having this right and such an interest and no more, and being invested by his office and the law with the power, in his discretion, to bring suit or to compromise and settle the claim without suit, he was not absolutely bound to sue and recover the property itself, or have its value ascertained by suit; but, if acting *bona fide*, without fraud or collusion, he might settle the claim without suit, and release and discharge this right of action to any of these parties for a valuable consideration. The interests of creditors and distributees require, as we feel well persuaded, that executors and administrators should have such a power.—A judicious and timely compromise would often prove highly beneficial to creditors and distributees. The fidelity of the administrator, the *bona fides* of his conduct in making such settlement or compromise, would be always open to inquiry by the parties in interest.

These principles, if correct, establish the right of the administrator, Nosworthy, to receive satisfaction from Mrs. Woolfork or McKinney, or both, without suit, for the unlawful conversion of the slaves in controversy. He was at liberty to elect whether he would do this or sue, being responsible of course to the legatees and distributees on settlement for the exercise of a sound discretion, and for honest intentions in making such election.

The charge given by the court below was in conformity with the foregoing views, as was also the qualification annexed to the charge as requested by plaintiff.

The request of the plaintiff, to charge that he was entitled to a verdict upon the whole evidence, was correctly refused, because, on one material question of fact the testimony was conflicting.

We find no error in the record, and the judgment below is affirmed.

HALSTEAD ET AL. *vs.* SHEPARD.

1. In determining the question of multifariousness the court can look to the bill only, and not to the answers or proof.
2. A bill is not multifarious, which seeks to establish complainant's interest as a partner in certain notes payable to the partnership, which are alleged to have been fraudulently transferred by his co-partner to the other defendants, by separate assignments made at different times.
3. When a note payable to a partnership is transferred by one of the partners in payment of his individual debts, the purchaser acquires only the assignor's interest, and holds the note subject in equity to the claim of the other partners.
4. And an assignee who purchases for cash, after the maturity of the note and while it is in the hands of an attorney for suit, relying upon his assignor's representations as to the state of accounts between his co-partner and himself and his right to dispose of the note, is affected with notice of the other partner's interest upon a settlement of the partnership accounts.
5. Ordinarily, during the existence of the partnership, one partner, acting within the scope of the partnership business, may sell and dispose of the entire interest in the partnership effects; but when the firm, though not formally dissolved, has closed its business, and reduced all its assets to the shape of two notes payable to the firm, if one partner fraudulently transfers these, the purchaser takes them subject to the other partner's equity.
6. The answer of one defendant cannot be used as evidence against his co-defendants in stating an account before the master; but if the other answers and proof in the cause show a greater balance against them than the account as stated on the basis furnished by the answer, it is error without injury.

APPEAL from the Chancery Court at Monroeville.

Heard before the Hon. J. W. LESESNE.

THIS was a bill filed by Alfred Shepard, the appellee, against Benjamin H. Halstead, his late co-partner, Wilson Ashley, Elijah McCreary, Willis Strickland and William Thomas as administrator of Joseph Thomas, deceased. It alleges that complainant and said Halstead entered into a co-partnership for the purpose of building a mill in Conecuh County; that in pursuance of said agreement, they built in company a saw and grist mill, and run the same for a certain time named in said bill; that they afterwards sold out the mills, with the lands on which they were situate, and all their improvements, to one Joseph Thomas, for four hundred thousand feet of lumber to be delivered at a certain place named, to-wit: the head waters of Pensacola Bay, within a given time, and delivered to the said Thomas the possession thereof; that a small part of the lumber was delivered, but there being a breach of the contract, the said Halstead, who was left to wind up the partnership affairs, whilst the complainant had gone to Florida in order to receive and dispose of the lumber agreed to be paid for said mill, sued out an attachment against the said Thomas, and had levied or was about to levy upon property, when said claim was adjusted by the said Thomas giving to the said Halstead two certain notes, payable to the said Halstead & Shepard, made by the said Joseph Thomas, with one William Thomas and one John S. Leigh as sureties, one note for the sum of $2050, and one for the sum of $2650, each dated March 12, 1840, and each payable on the first day of March next after the date thereof; that the notes were unpaid at maturity, and suits were commenced thereon the next day in the Circuit Court of Conecuh County, where all the makers resided, by Messrs. Parsons & Cooper, attorneys at law; that before judgment was obtained, however, the said Jos. Thomas departed this life, and William Thomas administered on his estate; that judgment was rendered against the said William Thomas and the said Leigh, on each of the said notes, in the name of Halstead & Shepard; that the complainant was informed that the defendant Ashley had or claimed to have some interest in one of the notes, which he acquired from the said Halstead by shaving the same, or at a usurious rate of discount,

and that the other defendants also claimed some interest in the other of the notes, which they had acquired in like manner or in payment of a debt due and owing to them by the said Halstead individually.

The bill charges that the said Ashley, McCreary and Strickland obtained possession of the papers, or an interest in the judgments based upon them, from the said Halstead, fraudulently and colluding with him, with an intent to cheat the complainant out of his said interest therein; that in the partnership existing in the building of the said mill between complainant and the said Halstead, they were equally interested, and the said complainant expended as much, or about as much money as the said Halstead, and that the complainant is entitled to one half of the said notes. The bill calls upon the said defendants to make known their actual or pretended interest in the said notes, by what means that interest was acquired, what was paid for said notes, and in what manner; and prays that the partnership account be settled between the complainant and the said Halstead, and that the one half of the said notes be decreed to belong to the said complainant. The bill charges that the said Halstead is insolvent, and that he and the other defendants refused to acknowledge the rights of complainant, or to give him any part of said notes; that they have been paid by the said Thomas, administrator, and the money is in the hands of the said defendants. The bill alleges that the notes have been transferred to Ashley, McCreary and Strickland, but in what manner is not stated, and alleges such transfer to have been made with notice to all of them of the rights of the complainant, and that they hold them in such manner as to enable the complainant to call upon them to pay to him his portion of said notes.

Each of the defendants answers separately, and each admits the existence of the partnership, the building and sale of the mill, the taking of the notes, and the suits thereon, as stated in the bill. They all admit that judgments were rendered in the Circuit Court of Conecuh County on said notes, both against said William Thomas and said Leigh, the sureties of Joseph Thomas, and also against the said William Thomas, administrator of the said Joseph, deceased; that one of these judgments was for $2779 58 on the larger note, and the other for

the sum of $1124 75 on the smaller note, the credits to which it was entitled reducing it to that amount.

The said Halstead states that, prior to the rendition of said judgments, he transferred Parsons & Cooper's receipt for the larger note to the said Ashley for the sum of $2000 in cash; that the judgments on these notes were rendered at the Fall term of the court in 1841; that in August, 1842, he transferred $814 75 of the smaller judgment to the said Strickland in payment of a debt which he owed to the said Strickland, and on the 29th day of September, 1842, he transferred the balance of the said smaller judgment to the said McCreary in payment of a debt which he owed to the said McCreary; all these transfers were made in the name of Halstead & Shepard; admits that the said complainant had a half interest in said notes, and that said complainant was indebted to him only in the sum of $139 99, and this amount paid to him will make their accounts square, excluding entirely the two notes; that at the time he transferred the receipt to the larger note to the said Ashley he told said Ashley that he had about $1200 of notes against said complainant, and judging at that time by what the lumber in his opinion ought to have brought, the said complainant, who had received the lumber, ought to have been indebted to him about $300; but on striking a balance of accounts it appears that the said complainant was indebted to him only about $139 99, as above stated; denies that he refused to settle with the complainant, and alleges his willingness to do so at all times; admits that, at the present time, he is insolvent; states that he could have commanded $1200 in notes against the complainant at the time he sold the note to Ashley, but the complainant told him that he was insolvent, and urged him not to purchase said notes, and he did not do so; denies all fraud and all collusion or combination of every kind whatsoever.

The answer of McCreary and Strickland admits that they purchased their respective interests in the said judgment for debts due them by said Halstead individually; deny all fraud; deny that they had any notice that one half of the judgment belonged to complainant; admit that the portion of the judgment owned by each of them has been settled by the said Thomas; deny that they knew Halstead was insolvent at the time that they purchased said judgment.

The answer of Ashley admits that he purchased the larger note, or rather the receipt for the larger note, of the said Halstead, for the consideration and in the manner detailed by him; states that he was informed and believed that complainant had received his full share of the partnership effects, and that upon a fair accounting between the said Halstead and said complainant, he, the said Halstead, would owe nothing to the complainant; states that he thought then, and now believes, that the said Halstead had the full right and power to transfer the entire interest in the note to him. "Wherefore," he says, "he charges and affirms that he purchased said note without any notice or knowledge of any interest which said complainant had therein, further than was apparent on the face of the note; and the said Halstead told him expressly, that he, Halstead, had claims against the complainant for more than his interest in said notes; denies all fraud and all combination; admits that said note has been paid and settled by the said Thomas, denies that Halstead was insolvent at the time the note was transferred to him, but alleges that he was solvent and in good credit; denies that he has any interest in common with the said McCreary and the said Strickland.

William Thomas answers the bill also, but there is nothing in his answer differing from that of the other defendants, and it is not deemed necessary to state any of the facts which it contains.

The defendants demurred to the bill for multifariousness, but the demurrer was overruled.

Several witnesses were examined, but it is not deemed necessary that any of the testimony should be stated, except that of one, viz., Laird B. Flemming. In answer to one of the interrogatories propounded to him, he says: "In February, 1841, I asked Halstead, in Mr. Ashley's presence, if I could effect a trade with Shepard for his half of the Thomas notes, which were given for a saw mill on Bottle creek, near Brooklin, whether he would give me Shepard's part of the note. Mr. Halstead replied to me, that he was garnisheed by John Campbell, of Pensacola, for the amount of Shepard's part of that claim. Mr. Halstead distinctly acknowledged one half of the notes received for the mill was the property of Mr. Shepard, and in the presence of Mr. Ashley. I cannot be mistaken about Mr. Ashley's hearing the conversation between Mr. Hal-

stead and myself, because he, Mr. Ashley, remarked at the same time, that he was surprised at Mr. Halstead's being garnisheed on Mr. Shepard's account. Mr. Halstead further stated to Mr. Ashley and myself, that he had had offers for the notes so as to have realized the amount of the notes by discounting the lawful interest, but he had not done it, nor did he think he ought to do it until he could hear from Shepard. Halstead further stated to me and Ashley, that he, Ashley, had offered him, Halstead, fifteen per cent. discount for the notes, the whole amount of which, I think, was $4000.

"At the conclusion of the conversation between Halstead, Ashley and myself, above referred to, Mr. Halstead remarked, that he could have made a good trade with Ashley so far as his interest in the notes was concerned, but that he did not feel willing to do it without Shepard's approbation and consent, and further, that if Mr. Campbell withdrew his proceedings against Shepard, he, Halstead, would inform me, when Shepard and myself could go up, and he would close the matter."

On the final hearing, the Chancellor decreed the complainant the relief which he prayed, and ordered a reference to the master to take and state the account between the partners, and ruled that only such interest in the two notes passed to the respective purchasers as the said Halstead had, and further decreed that said parties who had received the money on said notes should refund to the complainant the proportion to which he should be found entitled, on the taking and stating the account as aforesaid.

The rendering of this decree is assigned for error. In making up the account, the master used the answer of the said Halstead as evidence against the other defendants, Ashley, McCreary and Strickland. To this the defendants below excepted, and the exception was overruled, both by the master and the Chancellor, and that is also assigned for error.

F. S. Blount and Thos. H. Watts, for appellants:

The bill is multifarious. There is no connection whatever shown between Ashley and the other defendants McCreary and Strickland. They claim separate and distinct interests, and by altogether a different title.—Colburn *et al.* v. Broughton *et al.*, 9 Ala. 351, and authorities there cited; Turnipseed v. Good-

win *et al.*, 9 Ala. 372; McIntosh v. Alexander, 16 Ala. 87; Felder v. Davis, 17 Ala. 422, 424. The opinions in the two cases last cited were delivered by Judge Dargan, and they are particularly referred to as an answer to his argument in this case. There is here no common ground of defence; the relief may be perfectly made out as to McCreary and Strickland, without affecting Ashley's defence in the slightest degree. His case is wholly distinct from theirs, and he claims a judgment in no manner connected with theirs.

There was a complete remedy at law, as to all the defendants except Halstead.—White v. Toles and Dunlap, 7 Ala. 569; Burwell & Clarke v. Springfield, 15 Ala. 273.

The bill, answers and proof, so far as Ashley is concerned, show that he purchased the note on Thomas, payable to Halstead & Shepard, from Halstead, one of the partners. All fraud and collusion, charged in the bill, are fully and positively denied by the answers of Ashley and Halstead, and no proof is taken to sustain such allegations. The charge that Ashley knew, at the time he purchased the note, of Halstead's intention to defraud his partner, is expressly denied, and is wholly unsustained by proof. The charge that Halstead was insolvent, and that this fact was known to Ashley when he purchased, is positively denied by Ashley, and no proof is taken to sustain it. The only proof of Halstead's insolvency, is his own answer, in which he admits his insolvency at the time the bill was filed, nearly two years after Ashley's purchase. This was no proof as against Ashley, even if it related back to the time of his purchase. The whole case made by the bill and proof, so far as Ashley is concerned, is, whether one partner, whilst the partnership is in existence, has the right to sell or dispose of the property and choses in action belonging to the firm for valuable consideration; and this question presents no difficulty.—All the elementary authors, as well as numerous adjudications, show that he has this power.—Story on Partnership 138 § 94, 140 § § 103, 104, 105; Collyer on Partnership 358 § § 394, 395, 400; Cullum v. Bloodgood, 15 Ala. 34; Harrison v. Sterry, 5 Cranch 300; Winship v. Bank of the United States, 5 Peters 560, 563; Arnold v. Brown, 24 Pick. 89; 1 Metcalf 518; 1 Brock. 456; 3 Johns. 70; 4 Johns. 277; 5 Hill N. Y. 163; 1 Barbour 648; 2 Paige 310.

E. S. Dargan and S. F. Rice, *contra:*

1. Assuming the case made by the bill to be true, and the acts of the defendants to the bill in reference to the notes and the judgments thereon founded, amounted to a breach of trust in which all the defendants are implicated, and authorized the complainant as the injured *cestui que trust* to come into equity and assert his right to one half the money called for by the notes and judgments. The object of the bill is, to secure a trust fund in the hands of the several defendants, who, by their participation with the trustee, in a breach of trust, had acquired possession of portions of the trust fund.—Eldridge v. Turner, 11 Ala. R. 1056; May v. Nabors, 6 Ala. 24; Lucas v. Kernodle, 2 Ala. 199; Collyer on Partnership §§ 179 to 185; Crawshay v. Collins, 15 Ves. R. 226.

2. The cases from the Alabama Reports above cited conclusively prove, that even if Halstead had transferred the legal title to the whole of the notes to his co-defendants, such transfer would have conveyed to them only "the beneficial interest in that part which belonged to the assignor; and as to the residue, the assignee, who stands in the shoes of the assignor, will be a trustee for those who are beneficially entitled to it;" and that "the assignee of a note, for valuable consideration and without notice, was affected by a latent equity subsisting between the parties."—2 Ala. R. 202. But Halstead never did transfer the legal interest in the notes to any person, nor did the complainant.—6 Ala. 26.

3. The foregoing authorities also prove that, inasmuch as the only interest the co-defendants of Halstead can pretend to have, is a mere equitable interest, their equity is *younger* than complainant's, and inferior in every point of view to it, at least to the extent of one half the whole fund.—See also Donelson v. Posey, 13 Ala. R. 752, 771; Felder v. Davis, 17 Ala. 418; Gaines v. Chew, 2 How. (N. Y.) R. 619.

The notes are not the trust fund. The notes are not the debt, but the mere evidence of the debt. The debt is the trust fund. This debt is but one debt, although evidenced by several notes. And this debt is the property of the partners, created for land sold by them. Each of the co-defendants of Halstead asserts a claim to a part of this one debt, due for the partnership land and mills; and each says he derived his claim from Hal-

stead, who, as the partner of the complainant, had the right to sell and transfer this one debt. And it is apparent from the allegations of the bill, that Halstead is not only guilty of a mere breach of trust, but of a fraud towards his partner, (Shepard,) and that each of his co-defendants participated in that fraud.

4. The bill is not multifarious. It is now well settled, that, when different defendants claim different and separate parts of the property sought to be recovered, and the bill shows that all of them claim the same title which the complainant asserts, they may all be joined in one bill, because, having the same title asserted against them, they may all unite upon one common ground of defence. In Gaines & Wife v. Chew, 2 Howard's R. 619, all the defendants claimed the same title which the complainant asserted, to-wit: the title of Clarke, the ancestor of Mrs. Gaines; they had acquired their titles at different times, but from the same source; and the bill was held not to be multifarious. The case of Brinkerhoof v. Brown, 6 Johns. Ch. 139, is to the same effect. In Felder v. Davis, 17 Ala. 418, the bill was held multifarious, because it showed that the several defendants derived their titles at different times, by distinct acts of trespass or tort, amounting to a conversion by one who, as the bill showed, had no title; therefore, they did not claim the title of complainant according to the allegations, for the husband of Mrs. Felder was not the trustee, and could not convey her title. The court admit that, if the bill had shown that the defendants all claimed the same title asserted by complainant, it would have been multifarious; but, as it showed that they derived title from a different source, and from one who might have claimed adversely to the complainant's title, it was multifarious, because a mere equitable title alone would not authorize the joining of different defendants, who did not claim in connection with each other, and who, according to the bill, did not have the title asserted by the complainant. This decision takes the correct distinction.

5. Even if it were conceded, that one partner in such a partnership as is shown in this case (to-wit: a partnership for sawing and selling lumber and carrying on a mill owned by the firm) has power to make a valid sale of a debt due the firm, to a *bona fide* purchaser for valuable consideration, without notice of

the rights or interests of the other partner; still, the complainant in this case is entitled to the decree rendered in his favor upon the pleadings and proof, because the bill and answers and proof clearly show that no one of the defendants is a *bona fide* purchaser for valuable consideration and without notice.—Galway v. Mathew, 10 East's R. 264, cited and approved, 2 Ala. 511; Pierce v. Pass, 1 Por. R. 232; Nolen v. The Heirs of Gwynn, 16 Ala. 728, defining a *bona fide* purchaser, &c.; 16 Johns. R. 34; Jewett v. Parmer, 7 Johns. Ch. R. 65, which shows that the answers of the defendants in this case do not even properly set up the defence of *bona fide* purchaser without notice; Bailey v. Wilson, 1 Dev. & Batt. Eq. R. 187; Saltmarsh v. Tuthill, 13 Ala. 407.

6. But whatever may be the law elsewhere, or whatever may be the law here as to the power of one partner in "a partnership in trade"—a mercantile partnership—by a sale of a debt due the firm, to bind the firm, (especially if the sale is in payment of a partnership debt,) it is settled as law in this State, that one partner in such a partnership as is shown in this case cannot bind his co-partner, without his consent, by exchanging the debts due the firm for his own private debt, nor by shaving off the firm debts at a discount of more than twenty per cent.; for this violates the implied obligation of partners to use the joint property for the benefit of all.—15 Ves. R. 226; Cocke v. B'k Mobile, 3 Ala. 175; Krebs v. O'Grady, June Term, 1853, by Judge Goldthwaite.

The power of one partner to bind another without his consent, is not as much favored in Alabama as in England, but is more restricted. "Partners are not liable for each other's acts, to a greater extent than they appear by their general course of dealing to have authorized."—Catlin v. Gilder, 3 Ala. 536; Mauldin v. Br. Bank Mobile, 2 Ala. 512, 513; Rolston v. Click, 1 Stew. Rep. 526; Pierce v. Pass, 1 Por. R. 232.

The law itself makes a distinction between the tangible property or effects of a firm and debts due to the firm. It allows a creditor of one partner to execute and sell that partner's interest in the former; but will not allow him to attach or sell by garnishment or other process at law, that partner's interest in the latter—that is, in the debts due the firm.—Winston v. Ewing, 1 Ala. 129. The reason given for not allowing the interest

of one partner in a debt due to the firm to be reached by garnishment at the suit of the creditor of that partner, is, that "the judgment against the garnishee, if acquiesced in, changes the right of property, and divests the co-partner's title to the property attached."—Winston v. Ewing, 1 Ala. 129.

7. The principle settled in Gallway v. Mathew & Smithson, 10 East's R. 264, sustains the decree fully in this case, especially as against Ashley. For it is proved expressly by Laird B. Fleming that, in February, 1841, (pages 65 and 66,) and before Ashley bought the note at the heavy discount, he (Ashley) heard from Halstead a distinct admission of Shepard's interest in the note, &c. &c., and it clearly appears that he can take no higher ground than that he traded for the note on the assurance of Halstead given at the time of the trade. And these representations or declarations of Halstead cannot avail him, for they are not evidence against Shepard, to deprive Shepard of his right to the note or a moiety of it.—Scott v. Danby, 12 Ala. R. 714. The *onus probandi* of the assent or authority of the injured partner (Shepard) is on the defendants.—1 Port. 232, *supra;* 1 Stew. 526, *supra.*

8. If Ashley has any equity at all equal to the legal and equitable right of complainant, or which can be sustained against complainant, it is only a claim to be protected to the extent of the money actually paid by him before he had notice that complainant would assert his rights. He cannot be allowed to retain any profit; protection is all he can ask, to the extent before indicated.—Houston v. Crutchfield, 22 Ala. But the true rule is, to hold him accountable as a trustee for the injured partner, without any regard to what he paid out.

The answer of Ashley is not a denial of notice of Shepard's interest in the notes.—Bailey v. Wilson, 1 Dev. & Batt. Eq. R. 187. But even if it be construed as a denial of notice, the deposition of Laird B. Fleming, (pages 65 and 66,) corroborated as it is by the note as well as by other circumstances disclosed by the answers and proof, is sufficient to turn the scale in favor of complainant.—Eldridge v. Turner, 11 Ala. 1057; Gunn v. Brantley, 21 Ala. R.; May v. Nabors, 6 Ala. 26.

GIBBONS, J.—A demurrer was filed to the bill in the present case for multifariousness, and that constitutes the first ques-

tion presented for our decision. It is not improper to premise that, in determining whether the demurrer is sustainable or not, we can look alone to the bill, and not to the answers of the several defendants, or the proofs in the cause.

It is unquestionably true that it is not competent for a party to join improperly in one bill distinct and independent matters, and thereby confound them; "as for example, the uniting in one bill of several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill."—Story's Equity Pl. § 271. But on the other hand, "a bill is not to be treated as multifarious, because it joins two good causes of complaint growing out of the same transaction, where all the defendants are interested in the same claim of right, and where the relief asked for in relation to each is of the same general character. Neither will a bill be deemed multifarious where it states a right to an account from A and B, against whom it has one remedy which it seeks to enforce, and also claims a lien against A, for what is due, and seeks that separate remedy against him; for the plaintiff may well, in such a bill, entitle himself to each. Indeed, the objection of multifariousness, and the circumstances under which it will be allowed to prevail or not, is, in many cases, as we shall hereafter see, a matter of discretion, and no general rule can be laid down on the subject."—*Ib.* § 284. The counsel for the plaintiff in error, amongst other authorities to this point, has cited the cases of Meachem v. Williams, 9 Ala. 482, and Felder *et al.* v. Davis *et al.*, 17 Ala. 418. In this latter case, Chief Justice Dargan, in commenting upon the authorities, and making a kind of summary of them, says: "Without examining in detail all the cases referred to by counsel, we deem it sufficient to say, that they show either that the defendants claimed the title asserted by the complainant, or that they claimed to derive from the same source, either mediately or immediately, from which the complainant derived his; the same fact or circumstance was alleged which rendered the title of the defendants invalid, which fact or circumstance, being the common ground of defence to all, became the connecting link that bound them all together.—Where the defence of all the defendants centers in the point in issue, they may all be joined in one suit, notwithstanding they

may separately possess distinct parcels of the property sought to be recovered."

The facts of the case in which the above language was employed, were as follows: One B. Davis conveyed to one James Davis certain negroes, in trust for his daughter, Elizabeth Felder, the wife of B. B. Felder. The negroes went into the possession and control of the wife of Felder and of the trustee, Davis. Afterwards the trustee, becoming embarrassed, left the country, and the slaves went into the possession and control of the husband, B. B. Felder, who sold them as his own property to different individuals, and at different times, without the slightest regard to the fact that they were trust property, or that the legal title was in the trustee who had left the country. A bill filed by the wife and children, the *cestuis que trust* under the trust deed, against all the parties jointly having the several negroes, the trust property, and praying that the said negroes be delivered up to them, or to another trustee to be appointed, was held multifarious. This case we consider the most direct authority produced by the plaintiff in error in support of the demurrer. It is useless to deny that there is a striking analogy between the facts of that case and the case at bar. We think, however, that a clear distinction may be perceived between the facts of the two cases. The defendants in that case did not claim, or pretend to claim, the title under which the plaintiffs sought to recover the property. Every act of sale on the part of Felder, the husband, was a distinct trespass, without any pretence that he was acting in obedience to or passing the title under which the complainants sought to recover the property.

One of the tests by which to show that the bill is not multifarious is, that the several defendants claim the same title as that set up by the complainant in his bill.

In the bill before us, it is shown that the defendants claim that portion of the notes which is claimed by the complainant, by the same title as the complainant himself. Halstead, the partner of the complainant, is represented to have conveyed away these notes, not by a title different from his, but by the same title; and the allegation is, that he did so without authority from the complainant, and in fraud of his rights. This distinction between the facts of this case and those of the case cited, we consider sufficiently marked to take it from its controlling influence as an authority.

There are in the present case, in our opinion, a number of circumstances in the facts presented by the bill, to free it from the objection of multifariousness. In the first place, the complainant and the defendants, Ashley, McCreary and Strickland, claim the one half of the notes, as above remarked, by a common title; secondly, the defence of the defendants is, in one aspect of the case, a common defence, viz., the authority of the said Halstead to sell and dispose of the half of the notes owned by the complainant, and this is said to be another test by which a bill is determined not to be liable to the objection of multifariousness; thirdly, in the account to be taken before the master, to ascertain the extent of the interest of the said Halstead in the notes, as that is shown by the bill to be in some measure dependent upon the state of the accounts between the parties, the defendants stand upon one common ground, and their defence is in this aspect also identical. Besides, the bill is filed for a discovery, as well as for an account and relief. It does not show on its face distinct and separate transactions, in so plain and distinct a manner as that this court can say that the interests of the several defendants, represented as claiming the notes, are separate and distinct from each other. On the contrary, we think the legitimate inference to be drawn from the language of the bill is, that the three defendants above named are all holding a joint interest in the papers, or acting with a common intent with Halstead to defeat the complainant in the recovery of any portion of either of the notes. The bill does not pretend to disclose which note was passed to either of the defendants, or the extent of the interest which they set up in the papers, and calls upon them to disclose the facts to the court. A bill so framed, with facts such as are alleged in the bill before us, we do not consider obnoxious to the objection of multifariousness, and the court below committed no error in overruling the demurrer.

Upon the merits of the case, on the final hearing, we have but little difficulty in affirming the decree of the Chancellor. So far as respects the case made by McCreary and Strickland, there can be no doubt. Their answers to the bill, concurring with the answer of Halstead, show that they respectively acquired the interest which they claim in the note or judgment in consideration of certain individual debts of Halstead owing to them be-

ing given up to said Halstead in payment. No principle is better settled in our law, than that one partner cannot dispose of the property or assets of the partnership in payment of his own individual debts. Such transfers of property could not prevent the recovery of it by suit in the name of the partnership; and in a court of equity, the most the purchaser could insist upon would be, the extent of the interest of the partner of whom he had made the purchase. As these defendants acquired their interest in the note which they claim by a transfer from Halstead, whilst the face of the paper gave them notice of the original proprietary interest of the complainant, and taking it upon the faith of Halstead alone, as to his authority to pass the whole title, and in payment of individual debts of Halstead, they must be considered as holding it subject to the interest of the complainant. In a court of equity, Halstead could pass so much of the interest in the paper as he actually owned, and no more.

But the claim set up by Ashley stands upon somewhat different grounds. He claims to have paid cash for the note which he holds, and denies, as his counsel insists, that he had any notice of the rights of the complainant. Waiving the consideration of the question arising out of the rate of discount at which he acquired the paper, it satisfactorily appears that he purchased the note after its maturity, and while in the hands of the attorney for suit.

He states in his answer, that, "at the time he so purchased said note of said Halstead, he was informed and believed that said complainant had received his full share and portion of the partnership effects, and that upon a fair accounting between said Halstead & Shepard, said Halstead would owe Shepard nothing; and he also charges that he then believed, and now believes, that the said Halstead, as one of the firm, had full right, power and authority to assign, transfer and deliver said note to him."

Here is a virtual admission on the part of Ashley, that he was aware of the interest of the complainant in the note, but dealt with Halstead upon his representation as to the state of the accounts between him and the complainant. But the testimony of the witness, Fleming, proves, beyond all doubt, that, even according to the representations of Halstead, made in

Ashley's presence before he made the purchase of the note, he knew that the complainant had an interest in the paper, and that he was then controlling it for himself. He must be held, therefore, to have purchased the note after its maturity, and with notice that the complainant had a claim to it, predicated upon the partnership accounts between himself and Halstead. He cannot complain of this, because he says he purchased the note upon this precise hypothesis, that upon a fair accounting of the partners together, the said complainant would have no interest in the note, as he had received from the partnership all that he was entitled to. If the faith which he placed in the representations of Halstead, at the time he made the purchase of the note, has proved to be misplaced, he has no one to blame but himself, as he was advised on a former occasion of a contrary state of facts by Halstead himself.

But it is insisted on the part of Ashley, that Halstead had the power, from his position as partner under the circumstances, the partnership being yet undissolved, to sell the notes, and pass the entire title to the purchaser, whether the purchaser had notice or not of the actual interest of the complainant. In this we cannot agree with the counsel. In ordinary partnerships, particularly those of a mercantile character, it is undoubtedly true, that, while the partnership is subsisting, one partner, acting within the scope of the ordinary business of the firm, has the right to sell and dispose of the property of the firm to the extent of the entire stock; so he would have the same right to dispose of the property for the purpose of paying the debts of the firm. But, whilst this is true, on the other hand one partner has no right to dispose of the partnership property, except within the scope of the partnership business. "There is an implied obligation among partners to use the property for the benefit of those whose property it is."—Collyer on Part. § 179. If, therefore, one partner undertakes to dispose of the partnership effects to the injury and wrong of the other partners, equity will interpose to give them relief; and if the purchasers of such effects take them with notice of such fraudulent intent on the part of the partner making the sale, they will be considered as parties to the fraud, and liable in equity with the fraudulent partner to refund to the remaining partners. The bill, it is true, shows that the partnership had never been formally dissolved;

yet it appears by the bill that it had ceased the business in which it was engaged in its formation, and had, as a firm, no active business whatever, except to wind up its affairs. The stock in trade of the partnership had been sold out by the consent of both partners; its business brought to a close, and the effects of the firm reduced to the shape of the two notes described in the bill. It is not shown that it was necessary to sell this note to Ashley for the purpose of paying partnership debts, nor does it appear that the firm was in debt at all.

The bill, answer and proof upon this subject, we think, establish the fact that it was the intention of Halstead, in disposing of the paper in the way he did to Ashley, to deprive the complainant wrongfully, if not fraudulently, of his rights therein; and further, that Ashley, if not cognizant of the intention of Halstead in thus disposing of the note, took it with notice of the interest and rights of the complainant, and is therefore in equity liable, the said Halstead being insolvent, to respond to the said complainant to the extent of his interest in the note.

The only remaining question presented by the record for our revision is, the assignment of error that the master, in taking the account, used the answer of Halstead as evidence against the other defendants. In thus using the answer of Halstead by the master there was no error of which the defendants, Ashley, McCreary and Strickland, can complain. That the answer of Halstead, on the subject of the accounts between him and the complainant, his co-partner, under the general rule, is incompetent evidence as against the other defendants, there can be no doubt; and if it appeared that the defendants had received any injury from this error, or if there was any room for the presumption that they could have received any injury, we should undoubtedly be compelled to reverse the case. But such is not the fact. The answer of Halstead is adopted by the master as the basis of his report, so far as respects the state of the accounts between him and the complainant. By this answer it appears, that the complainant is indebted to him in the sum of $139 99, that is, he is entitled to that much more in the notes than the complainant. Now suppose the answer of Halstead is excluded as evidence before the master, and he is compelled to make up his report from the other evidence in the cause; how then would it have stood? Each of the answers of the several

defendants admits the existence of the partnership, and that the papers in question were partnership papers. The partnership, then, being admitted, the presumption of law arising upon that admission is, that it is an equal partnership, and consequently the interest of the partners is equal in the property. This must necessarily have been the report of the master, in the absence of the answer of Halstead. Inasmuch, therefore, as the error committed by the master operates in favor of the defendants, instead of against them, we could not, as above remarked, reverse the cause for that reason.

Our conclusion is, that we find no error in the record of which the plaintiffs in error can complain, and the decree of the Chancellor is consequently in all things affirmed.

McCARGO *vs.* CRUTCHER.

1. Assumpsit does not lie on an award when the submission to arbitration is under seal.

ERROR to the Circuit Court of Limestone.

Tried before the Hon. THOMAS A. WALKER.

ASSUMPSIT by Reuben Crutcher against Allen McCargo, on an account stated; the common counts also being added. The plea was the general issue, "with leave to give all special matters in evidence, in short by consent." Verdict and judgment for plaintiff below for $2426 64.

It appears from the bill of exceptions, that the plaintiff relied on an award made by certain arbitrators under the following agreement:

"An article of agreement made and entered into on the 12th day of March, in the year 1851, between Allen McCargo and Reuben Crutcher, both of Limestone County, State of Alabama, witnesseth, that whereas they formed a partnership in the year 1844, under the name and style of McCargo & Crutcher, and continued in the mercantile business until December, 1846, at

which time said co-partnership ceased: Now know ye, that the said McCargo & Crutcher have chosen and selected J. W. Sloss and W. Graves Bouldin, and do vest in them full and ample power, to make a settlement of their entire mercantile transactions for and during the said term of co-partnership; the settlement so made by them, and reported, to be binding on themselves, their heirs and assigns, and in confirmation of which we bind ourselves as gentlemen to stand to and abide, hereunto subscribing our names in Athens on the 12th of March, 1851.

"It is further understood, that, if hereafter anything should come up showing a different state of affairs relative to the settlement, it shall be allowed, with the consent of the said J. W. Sloss and W. Graves Bouldin; and it is further agreed by the said Allen McCargo and Reuben Crutcher, that all of their private transactions between themselves, and with the firm of Lesslie & McCargo, shall be referred to the said J. W. Sloss and W. Graves Bouldin, for final settlement, binding ourselves as above to abide by their settlement. Signed and sealed as above. (Signed) ALLEN McCARGO, [Seal.]
REUBEN CRUTCHER, [Seal.]"

The award made by the said arbitrators was in these words: "We, the undersigned, having investigated the books, papers, &c., belonging to the firm of McCargo & Crutcher, have settled the same, and find that Allen McCargo is justly indebted to Reuben Crutcher in the sum of $1996 33, due January 1, 1850, as per statement rendered. Athens, April 17, 1851.
(Signed) W. GRAVES BOULDIN,
J. W. SLOSS."

The court ruled that the action of assumpsit might be maintained for the recovery of the sum so awarded by the arbitrators, and this is now assigned for error, together with other matters not necessary to be stated.

BRICKELL & CABANISS, for plaintiff in error:

1. The submission to arbitration is under seal; therefore an action of assumpsit cannot be maintained on the award made in pursuance thereof.—Watson on Arbitration (59 Law Library) 201; Billing on Awards (51 Law Library) 158; Horton v. Rolands, 2 Porter 79; Tullis v. Scawell, 3 Ohio 510; Chitty's Pleading 101.

2. The award must be a final decision on all the matters in controversy submitted to the arbitrators. If any matter embraced in the submission is excepted out of the award, or is left undecided by the arbitrators, the award is void.—Russell on Arbitration 215; Watson on Arbitration 121; Billing on Awards 132.

RICHARDSON & PRYOR, *contra :*

1. The award was properly admitted as evidence on the trial of this cause.—2 Green. Ev. 62, 71; 2 Stark. Ev. 137, 139.

2. The agreement of submission, although under seal, was admissible as evidence. If a contract under seal be so executed as not to authorize a party injured by its breach to sue upon it, he may bring assumpsit, and make the contract inducement by his declaration; or he may give it in evidence without noticing it in the pleadings.—8 Porter 333, and cases there cited.—The agreement of submission in this case was so executed as not to authorize either party injured by its breach to sue upon it; the parties bind themselves by no sum or penalty, but only "as gentlemen," to abide by the award. Upon such an instrument no suit could be maintained for its breach, and therefore assumpsit was the proper remedy.—8 Porter 333, *supra.*

3. The award is perfect, and conforms strictly to the submission under which it was made. Awards are much favored, and the courts will intend every thing warranted by the record to sustain the judgments rendered upon them.—Tankersly v. Richardson, 2 Stewart 130. If the arbitrators transcend their authority, their award will be void *pro tanto* only, and good as to the residue.—15 Ala. 398. The award, by its terms, is final, nor has it been impeached for corruption, partiality or misbehavior on the part of the arbitrators, nor for mistake of law or fact apparent on its face.—Bumbass v. Webb, 4 Porter 65.

CHILTON, C. J.—It is too well settled now to admit of discussion, that where an award is made upon a parol submission, there assumpsit is maintainable; but where it is made upon an agreement or submission under seal, and the non-payment of the amount awarded is a breach of such agreement, assumpsit cannot be maintained, but debt or covenant according to circumstances.

The submission in the case before us binds the parties to abide by the award. True no penalty is affixed, but this is not essential to constitute the submission binding and obligatory, and the submission is under seal.

It is said, they bind themselves as "gentlemen," and this shows that the agreement was regarded as merely creating an honorable, not a legal obligation. We think the converse of the proposition was most likely in the contemplation of the parties, namely, that they not only bound themselves *legally* to abide by the award, but superadded to their legal obligation a mutual pledge to observe and keep it, by being bound "as gentlemen," as honorable men.

The counsel for the defendant in error are mistaken in supposing that no action can be maintained on the submission, for a breach of it in refusing to abide by the award. We think it clear that the party might have sued in covenant, averring as a breach the non-payment of the sum awarded to be paid; so that the case in 8 Porter 333 has no application.

Mr. Chitty (vol. 1, p. 101) says: "Assumpsit lies upon awards, where the submission is not by deed."

Mr. Watson (on Awards 355) says: "In all cases, excepting where the submission is by bond, *or agreement under seal*, an action of assumpsit will lie against a party for the non-performance of an award." See also, to the same effect, Billings on Awards 374.

It follows that the circuit judge improperly refused to charge that this action (assumpsit) could not be maintained on the award produced in evidence. As this point will be, in all probability, decisive of the case, we will not notice the other errors assigned.

Judgment reversed, and cause remanded if desired.

COLLIER, GOVERNOR &c., *vs.* POWELL AND BRADLEY.

1. In a summary proceeding under the act of 1848 or that of 1850, against a tax collector and his sureties, the principal is a necessary party to the notice; and if the notice shows on its face that he was dead before it issued, it is demurrable.
2. No costs can be adjudged against the State when it is plaintiff in a civil action and fails in its suit.

APPEAL from the Circuit Court of Montgomery.

Tried before Hon. JOHN GILL SHORTER.

THIS was a summary proceeding in the name of the governor for the use of the State, against Joseph B. Powell and Jesse G. Bradley, the appellees, as sureties of Thomas Wilson, late tax collector of Monroe County.

The notice is addressed to the sureties only, and on its face shows that said Wilson was dead before it issued. The appellees demurred to the notice, and their demurrer was sustained; and this judgment on the demurrer is now assigned for error.

M. A. BALDWIN, Attorney General, for appellant:

Suit, by motion, is authorized against tax collectors, their executors, securities, &c.—Clay's Digest 244 § 16; Acts 1847 p. 8 § 18; *ib.* 1849 p. 23 § 27.

Motions authorized to be made in circuit of Tuskaloosa County, were subsequently authorized to be made in Circuit Court of Montgomery County.—Acts 1847-8 p. 8 § 18; *ib.* p. 114 § 12; *ib.* p. 141 § 1.

Before the passage of the act of 1841, (Clay's Digest 536 § 14,) the Supreme Court held, no judgment by motion could be taken against the securities of a sheriff, except upon actual notice to the sheriff.—Orr v. Duval, 1 Ala. 262.

Upon this act of 1841, providing that "when a rule or notice shall issue against any late, or acting sheriff, and his securities in office, in any case now authorized by law, it shall be competent for the plaintiff, in such rule or notice, to recover judgment against such of the parties as service may have been effected on," it has been held, the issuance of the notice against

the principal was unnecessary.—Williamson & Daniel v. Br. Bk. at Montgomery, 3 Ala. 504; Bondurant v. Bank of the State of Ala., 5 *ib.* 172.

The acts of 1847–8, and acts of 1849–50, direct the comptroller to move for judgment against the tax collector and his sureties, and authorize a judgment against principal and sureties, "or when the notice is returned 'not executed,' 'or not found' as to the principal, then against such of the sureties as may have been notified of the intended motion."—Acts of 1847–8 p. 8 § 18; *ib.* 1849–50 p. 23 § 27.

The provisions of these acts are very similar, and in substance the same as the act of 1841, and the construction given to the act of 1841 must also be given to the acts of 1847–8 and 1849–50. The court say the sureties of the sheriff may be sued alone by notice and motion, and so, we contend, may the sureties of the tax collector.

According to the provisions of the acts of 1847–8 and 1849–50, there can be no doubt, if the notice had been issued against the tax collector and sureties, and returned "not executed," "or not found," as to the tax collector, although he was dead, judgment might have been taken against the sureties, on whom notice had been effected. And certainly, independent of the authority of the cases cited, there could be no good reason for connecting the name of the tax collector with those of the sureties, when he was dead, as averred in the notice.

The principle stated in Logan v. Barclay, 3 Ala. 361, has no application to the case before the court. That decision was made before the acts 1841, 1847–8, and 1849–50, by which the difficulties pointed out in Logan v. Barclay were intended to be obviated. By these acts no motion or revival of the motion against the principal is necessary to a successful prosecution against the sureties.

It was error to render judgment against the State for costs. The State acts through its officers, and for such acts its officers are not personally responsible.—Hodgson v. Dexter, 1 Cranch 364; 3 Pick. 17; 1 Term R. 172. In no case is the State liable for costs, unless specially charged by statute.—1 Haywood N. C. 221; United States v. Barker, 8 Peters 150; The Antelope, 12 Wheaton ; 4 Gill & J. 407; Smith's Com. on Statutes § 431.

WATTS, JUDGE & JACKSON, *contra :*

1. The motion in this case is predicated upon the eighteenth section of the act "to provide for the assessment and collection of taxes," approved 6th of March, 1848, (see Pamphlet Acts, session '47–8, page 8,) or upon the twenty-seventh section of the act "designating the subjects and sources, and prescribing the rates and mode of taxation," approved February 11th 1850, (see Pamphlet Acts, session '49–50, page 23,) both of which said sections are in terms nearly identical.

2. Under both said statutes, the tax collector is required to be a party to the motion, and must be proceeded against together with his sureties, unless he "absconds or secretes himself," or unless the "notice is returned 'not executed' as against him"; in either of which events the proceeding may go on "against such of his sureties as may have been notified of the intended motion."

3. The notice in this case discloses the fact, that, at the time the motion was made, or notice of it was given, the tax collector was dead; and hence the notice was issued to Powell and Bradley alone, as his sureties. For this proceeding there is no warrant to be found in the statute, and the remedy being a summary one, the statute giving it must be strictly pursued. The demurrer to the notice was therefore rightfully sustained; and we cite the following authorities, being cases analogous to this.—James & Auld v. Spear, 9 Ala. 462; Logan, adm'r, v. Barclay, 3 *ib.* 361; Andrews, adm'r, v. Br. Bk. Mobile, 10 *ib.* 375; Adm'r of Alexander v. Br. Bk. Mobile, 5 *ib.* 465; Murphy's Adm'r v. Br. Bk. Mobile, 5 *ib.* 241; Orr v. Duval *et al.*, 1 *ib.* 262; Mason & Daniel v. Brazier, 1 *ib.* 635.

LIGON J.—The proceeding in the court below was doubtless intended to be conformed to the eighteenth section of the act of 1847–8, or the twenty-seventh section of the act of 1849–50, which are in effect the same, and in language nearly identical.—The latter is in these words: "It shall be the duty of the comptroller of public accounts, within twenty days after the default of any tax collector, in not paying into the treasury the taxes collected by him, or paid to him by the county court clerk, for license or otherwise, under this act, at the next term of the Circuit or County Court of Montgomery County, or of the county in which the defaulting collector resides, to move the court for

judgment against him and his sureties, for the amount of the taxes not paid into the treasury; and the court shall render judgment for such amount, on proof of fifteen days notice to the collector, against him and his sureties; or where the collector absconds or secretes himself, or where the notice is returned 'not found' as to him, then against such of his sureties as may have been notified of the intended motion," &c.—Pamp. Acts 1849–50 § 27 p. 23; *ib.* 1847–8 § 18 p. 8.

Both these statutes require the tax collector to be a party to the notice, in every case; but if it appears that he absconds or secretes himself, or the notice issued to him is returned "not found," judgment may be rendered against such of his sureties as may be served with notice.

This proceeding is summary, and strictly statutory; it is therefore indispensable to its regularity that it should conform substantially to the provisions of the act by which it is authorized. A departure in this respect, if it appear by the face of the notice, will be fatal on demurrer. The notice here shows that Wilson, the tax collector, is not only no party to it, but that he was dead at the time of its issue. This failure to make the collector a party to the notice is a departure from the requirements of the statute, which, in cases under similar acts of the legislature, we have invariably and repeatedly held to be fatal to the recovery.—Orr v. Duval, 1 Ala. 262; Mason & Daniel v. Brazier, *ib.* 635; James v. Auld & Spear, 9 *ib.* 462; Logan v. Barclay, 3 *ib.* 361.

But we are referred by the counsel for the appellant to the act of 1841, (Clay's Digest 536 § 14,) as authority for proceeding against the sureties in this case, without noticing the principal. The act referred to gives him no aid, as by its terms it is limited to motions against sheriffs, and we are not allowed to extend its provisions.—James v. Auld & Spear, *supra.*

The court below erred in rendering judgment against the State for costs. The rule with regard to costs established by our statute, (Clay's Digest 316 §20,) does not include cases in which the State is plaintiff and fails in its suit; nor have we any statute which allows cost in such cases; and in the absence of legislation upon the subject, costs cannot be adjudged against the State.—United States v. Barker, 1 Peters 150; Smith on the Con. of Statutes § 431.

The statute providing that the State may be sued, and directing how the judgment shall be satisfied, (Clay's Digest 339 § § 143, 144, 145, 146,) has no application to this, or any other case in which the State is plaintiff and fails in its suit.

The judgment of the court below must, therefore, be corrected here, so far as it relates to the costs, without cost to either party; but the case will not be remanded, as it is evident the plaintiff can never recover in the present suit.

CROW *vs.* CROW.

1. When a husband abandons his wife without just cause, on account of a difficulty occurring between them respecting her property, and soon afterwards proposes a reconciliation through the medium of a third person, which the wife refuses, declaring that "she had made up her mind not to live with him any longer," her declaration is evidence that she consented to the separation, and she cannot afterwards obtain a divorce on account of the abandonment.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. JAMES B. CLARK.

LEONORA CROW, the appellee, by her next friend Charles H. Foster, filed a bill against her husband, Joseph L. Crow, for a divorce *a vinculo matrimonii*, alleging an abandonment on his part for more than three years preceding the filing of the bill.

The evidence shows that the parties were married in 1835, and lived together until 1845, when the husband left the house in consequence of a difficulty between them respecting certain property which had been left to the wife and her children by her father, since which time he has not returned; that the husband, in the latter part of the year 1845, sent a third person to the wife, for the purpose of seeing whether the difficulty could not be settled; that she informed him "that she had made up her mind not to live with him any longer; that she thought she had sufficient cause, but was not disposed to trumpet the faults of her husband to the world."

Upon this evidence the Chancellor decreed a divorce according to the prayer of the bill, and his decree is now assigned for error.

Henry C. Semple, for appellant.

A. P. Bagby, *contra.*

GOLDTHWAITE, J.—Our opinion is, that a divorce should not have been granted in this case. The evidence, it is true, shows that the husband in the first instance abandoned the complainant without just cause, and has continued to live apart from her for more than three years before the filing of the bill; and upon this proof there would be no difficulty; but the evidence also shows that, a short time after the abandonment, the husband proposed a reconciliation, through the medium of a third person; we say proposed a reconciliation, for the witness states that he called upon the complainant, at the request of the defendant, to learn from her what was the difficulty between them, and see if it could not be made up. Her reply to this offer was, that she had made up her mind not to live with him any longer; that she thought she had sufficient cause, but was not disposed to trumpet the faults of her husband to the world. This evinced very strongly an intention on her part not to live with her husband under any circumstances, and was not justified by the character of the difficulty which resulted in the abandonment by the husband in the first instance. This difficulty, as the record informs us, grew out of property which had been left to the complainant and her children by her father, and which the husband was attempting to squander. But this would, of itself, constitute no cause of divorce; and, although the abandonment of the husband was entirely unjustifiable, yet these circumstances, taken by themselves or together, were not sufficient to sustain the wife in the course she pursued. Difficulties of this character are not irreconcilable, and the wife should not have shut the door to an amicable adjustment of them, by declaring her intention that she had made up her mind not to live with him. We rest our decision, however, on the ground that the declaration made by her, on the occasion referred to, was evidence that she consented to the separation, in which case it is perfectly clear that she is not entitled to the relief she seeks.

The Chancellor thought that the husband should have made the application in person, and it is possible that it might have resulted differently if he had pursued this course. But, in a case like the present, we are unable to perceive any good reason why the offices of a third person may not be used as the means of affecting a reconciliation, and indeed the interposition of a common friend would often be more effectual than the personal application of the husband. The policy of the law is not in favor of divorces, and the position of the wife in the present case is not such as entitles her to one.

The decree of the Chancellor must, therefore, be reversed, and a decree here rendered dismissing the bill, each party to pay one half of the costs of this court and the court below.

HUDSON *vs.* HELMES' EXECUTORS.

1. The Court of Probate can only authorize a public sale by a guardian in the manner prescribed by the statute; a private sale under an order of the court, though sanctioned by the court, passes no title as against the ward.
2. If a guardian sells his ward's property at private sale, he is guilty of a conversion, and is chargeable on final settlement with the value of the property at the time of the conversion or of settlement, or at any intermediate time, and interest on that value from the time of conversion.

ERROR to the Court of Probate of Franklin.

THE defendants in error, who are the executors of Jeremiah S. Helmes, deceased, were cited before the Court of Probate to make a final settlement of their said testator's guardianship of James B. Hudson, the plaintiff in error. Both parties excepted to the rulings of the court, and the record contains two bills of exceptions; but as Hudson only has sued out a writ of error, and assigns errors in this court, it is only necessary to state the facts disclosed in his bill. They are as follows:

"The ward, James B. Hudson, introduced witnesses who proved that the guardian, J. S. Helmes, and John D. Inman,

sold a negro man slave, Peter, the property of the ward and the other distributees, at private sale, for and at the price of $486 50, and that said Helmes was admonished, before said sale, not so to dispose of the property; witness himself offered $500 for the boy, and now states in court that he would have given $800 for him, and that he is a smith now worth $1000. It is also proved that the hire of said boy was worth at least $150 a year, on an average, from 1844 to this time inclusive; and that James B. Hudson, when he assented to the sale, was a minor under the age of twenty-one years. Much proof was also introduced, showing that Peter was a young man, about twenty-two years of age, of bad character, a blacksmith by trade in the whitesmith department of that line of business; had nine skeleton keys in his possession, and had entered into the storehouse of John Sevier and stolen goods therefrom by night; was threatened with a prosecution, and witness thought, under all the circumstances, from $500 to 600 would do as his value at day of sale; that Helmes, the guardian, with Inman, one of the distributees, sold said boy for $503 50, to said John Sevier, on the 10th April, 1844, understanding that said Sevier was to carry the slave out of this State, and allowed Sevier the supposed value of the goods Peter had stolen from him, thus reducing the amount realized to $486 50; that Peter was of bad character, and was carried to Tennessee by said Sevier, and disposed of there. Sevier said the negro would now be worth about $700.

"Under this proof, the said Hudson, by his counsel, insists that the court should charge said Townes and Nooe, executors of said Helmes, and as such, with the hire of Peter as proved, from the time of said sale to this date, with interest on each year's hire; and that they should also be charged with the present value of Peter, which they insist is $1000; which the court declines to do, but charges the said executors with the sum of $700, as of the said day of sale, and interest to this date; to all of which rulings the said Hudson here now excepts."

The order of sale under which the negro was sold, dated March 21, 1844, is as follows:

"John D. Inman, in right of his wife, late Mary Hudson, and J. S. Helmes, guardian for John B. Hudson and James B. Hudson, filed their petition for the sale of a negro boy, Peter,

belonging to said heirs, for distribution; which petition being read and understood by the court, it is ordered that John D. Inman, in right of his wife, and J. S. Helmes, guardian, &c., be and they are hereby authorized to sell a certain negro man slave, named Peter, belonging to the estate of John F. Hudson, late of said county, deceased, and that they make due return to this court of such sale."

The executors returned an account of the sale, showing that the slave was sold for $503 50, and it was ordered by the court that the account of sales rendered be received and admitted to record.

The errors assigned are as follows:

"The court erred in not charging Helmes' executors with the full value of the slave Peter, as proven, of $1000, at day of settlement in that court, with interest on that sum from the time of said sale; and that the court should, in like manner, have charged said executors, as such, with the hire of Peter, as proven, at $150 per year, from the sale to the settlement, with interest on the same.

"That the court erred in only charging said defendants in error with $700, as the value of Peter, and interest on that value from the date of the sale and conversion by Helmes."

The defendants in error also move to dismiss the writ of error, because the plaintiff has coerced by execution the payment of the amount decreed in his favor.

Wm. Cooper, for plaintiff in error:

The sale was unauthorized and void, and did not divest the wards of their property in the slave.—Clay's Digest 223 § 13, 224 § 14; Hopper v. Steele, 18 Ala. 828; Swink v. Snodgrass, 17 Ala. 655; Martin v. Williams, 17 Ala. 190; Weir v. Davis, 4 Ala. 442; Dearman v. Dearman, 4 Ala. 526; Fambro v. Gantt, 12 Ala. 305; Ventress v. Smith, 10 Peters 161. If the sale did not divest the title of the wards, they had a right to demand him at the day of settlement, and, if he was not forthcoming, to have his hire to that time and his then value. Suppose the wards had sued in detinue; nothing could have defeated their right to recover both the hire and value at that date.

It is insisted by the adverse counsel, that the sale was au-

thorized by the order of court, and that the purchaser need not go behind the order; and Cole v. Connolly, 16 Ala. 280, is cited to sustain the position. That case does not sustain the position, and, if it did, would be overruled by the cases above cited; it is conceded there that there is a wide distinction between void and voidable orders and decrees, and 10 Peters 449 is cited. In this case, the pretended sale was never confirmed, the return was only ordered to be "received and recorded."

Where an executor, administratior or guardian, without authority, works the slaves, and cultivates the lands of the estate, the distributees have a right to the hire and rents or the crops, and they may elect which they will take.—Steele v. Knox, 10 Ala. 608, 613, and cases there cited.

The ward is entitled to the highest value of the property at any time from the day of sale to the day of settlement, because, if it had not been wrongfully withheld on the settlement, the ward would then have the property itself.—Clark & Clark v. Penny, 7 Cowen's R. 681; West v. Wentworth, 3 *ib.* 82; Shepherd v. Hampton, 3 Wheat. 200; Gainsford v. Carroll, 2 Barn. & Cress. 624; 2 East 211; 2 Taunton 257. Even in actions of trover, the plaintiff is entitled to the highest value to date of trial.—Ewing v. Blount, 20 Ala. 694; Tatum v. Manning, 9 Ala. 144; Lee v. Matthews, 10 Ala. 682.

John A. Nooe, *contra:*

Admitting that the order of sale was erroneous, yet, having been granted by a court of competent jurisdiction, it cannot be impeached or called in question collaterally.—Herbert v. Hanrick, 16 Ala. 592; Cole v. Connolly, 16 Ala. 280.

The distributees had no claim on the administrator for hire after the sale; for, according to the case last above cited, the purchaser got a good title, and when their claim to the negro ceased, their right to hire ceased also as a necessary consequence.

The plaintiff in error should not complain, as he received no injury. The administrator presented to the court a good and legal cause to authorize an order of sale; if the sale had been public, there would have been no cause of complaint whatever. Did plaintiff in error, then, suffer any injury by the private sale, when the administrator was charged with the amount for

which the slave would probably have sold publicly? This amount was all that he could be charged with under any circumstances.—Weir v. Davis, 4 Ala. 446; Steele v. Knox, 10 Ala. Rep. 615.

PHELAN, J.—A guardian, by the common law, had the right to the custody and management of the personal chattels of his ward, but had no title in them. His office, in this respect, differed from that of an executor or administrator, as being an agency only not coupled with an interest; and this agency did not ordinarily extend to the power to make sale of them.

But the rights both of guardians and executors to make sale of the property, whether real or personal, of wards and minors, are now wholly regulated by statute in this State. They are not allowed to sell, except under an order of the Probate Court, and then the time and manner of that sale is specially prescribed; and as to sales by executors or administrators it is expressly declared by statute, that they shall be utterly null and void if made in any other way.—Clay's Dig. 223-24 § § 13, 14.

It is clear that the interest of his ward, James B. Hudson, could not be lawfully sold by Helmes, the guardian, at private sale, although there was an order for a sale granted by the Orphans' Court. The court had no power to authorize a private sale. So far, then, as plaintiff in error was concerned, the sale of his interest in the slave Peter, made by his guardian Helmes privately, in conjunction with Inman, stands upon the same footing as it would if there had been no order of sale. It passed no title as against the ward.—Lay's Executor v. Lawson's Adm'r, at this term.

What then is the nature of a guardian's liability, who, without lawful authority, makes sale of his ward's chattels? His act is nothing different from that of any other bailee, who, having the rightful custody or possession of the goods or chattels of another for one purpose, converts them to another purpose, or sells or destroys them. The act is in law a *conversion*, and his liability a liability to pay damages commensurate with the nature and extent of that conversion. If a guardian were removed for such an act, as ordinarily he would be, and the ward should sue him on his bond or in any action of trover and con-

version, the measure of damages which he would be entitled to recover, in either case, would be the value of the property converted, with interest from the time of the conversion. This would not be the whole extent of the infant's rights, it is true. If the property remained in specie, he might recover it immediately from the holder by suit in detinue through a *prochein ami*, or he might do this by suit in his own name simply after coming of age, even after a lapse of years; or he might sue the holder in detinue, and the guardian in trover, and take in satisfaction whichever judgment he liked best.

But in this case the ward prefers to let his guardian remain in office for years after this act of conversion, and then calls him to a settlement. What, under such circumstances, is the rule which will do justice between the parties? It is, as we conceive, to treat the sale of the slave as a conversion, and charge the guardian with his value, as the court in its discretion may think proper, either at the time of the conversion, or of the settlement, or any time between, and interest on that value from the conversion. To make the guardian pay his value at the time of the settlement, and pay hire for him up to that settlement, with yearly interest on hire, as plaintiff in error claims to do, would be to make the guardian the insurer of the life of the ward's slave until the ward chooses to call him to a settlement, and then at the option of the ward to be made his purchaser.—There would be no safety for guardians, and ordinarily no justice, in such a rule; for many times it might happen that sales, which were not formal and legal, would be made in good faith, and prove greatly advantageous to the ward. Indeed there is nothing in the facts of this case, when fully considered, that would lead to the belief that the guardian did not act in perfect good faith so far as the ward was concerned. It appears that there was an adult equally interested with the minor, who partly conducted the sale of the slave Peter.

As the Probate Court made the guardian pay $700 for Peter, when he only sold for about $500, it seems to us that full justice was done to the minor under all the circumstances of the case. The rule adopted by the court below has been already sanctioned by one decision of this court.—Alexander v. Alexander, 8 Ala. 796.

The judgment below is affirmed.

The motion of defendant in error to dismiss the writ of error, we did not deem it important to decide, as the case was found to be with him on the errors assigned.

HOLLINGSWORTH *vs.* MARTIN, USE &C.

1. When the entire evidence consists of the testimony of one witness, a charge that, if the jury believed the evidence, plaintiff could not recover, is equivalent to a demurrer to the evidence, and raises the same question.
2. A promise to pay the debt or demand of a third person, unless reduced to writing and upon a legal consideration, is void under the statute of frauds.
3. Where a receipt bears date five days anterior to a note, and is for a different amount, the court cannot, in the absence of proof explaining the incongruities, infer that they were given for the same debt.
4. In charging the jury, it is the duty of the court to confine itself to the testimony; the judge ought not to assume that any fact is proved, unless there is some testimony tending to prove it, and then it should be stated hypothetically.

ERROR to the Circuit Court of Benton.

Tried before the Hon. THOMAS A. WALKER.

ASSUMPSIT by William B. Martin, for the use of John N. Young, against Stephen P. Hollingsworth. The cause of action endorsed on the writ is said to be the following instrument in writing:

"Received, Tuskaloosa, Februrary 11, 1836, of H. L. Martin, on account of William B. Martin, one hundred dollars.

(Signed) S. P. HOLLINGSWORTH."

The common counts for money had and received, and paid, laid out and expended, were added in the declaration.

It was agreed between the attorneys for the parties respectively that every thing might be given in evidence, and considered as pleaded, which could be pleaded in bar; that every thing might be given in evidence and considered as replied, which could be replied, and that appropriate issues should be regarded as made up.

A bill of exceptions was allowed on the trial, from which it

appears that only one witness was examined, and his testimony was all the proof in the cause, except the receipt above described and a certain note, which formed a part of the statement made by the witness.

His testimony was as follows, to-wit: "Some time in 1846 or 1847 Stephen P. Hollingsworth and Wm. B. Martin came to my office on the eve of Hollingsworth's leaving for Texas. Col. Martin, the plaintiff, claimed of Hollingsworth a certain amount, for professional services in settling up the estate of W. B. Hollingsworth or Benj. Hollingsworth, or both, not now distinctly recollected. S. P. Hollingsworth held a note on W. B. Martin, payable to Hollingsworth & Sons, for about $96, and refused to settle for professional services as he held the note of Martin; the amount of Martin's charge for services not recollected, but believe it was about the amount of the note. Martin stated, he had paid the note off through Henry L. Martin at Tuskaloosa, to S. P. Hollingsworth, for which he had a receipt, but could not get at it at that time. Hollingsworth deposited Martin's note with me, and stated, if Martin produced his receipt as above specified, he would be indebted to Martin the amount of the receipt. Stephen P. Hollingsworth was one of the firm of Hollingsworth & Sons, engaged in the mercantile business in Jacksonville. Stephen P. Hollingsworth acted as agent for his mother, who was the administratrix of the estate of Benj. Hollingsworth, deceased, in winding up said estate. S. P. Hollingsworth removed to Texas in 1836, and has not since resided in Alabama."

"The said witness also proved the note mentioned above by him, in the words and figures following, to-wit:

"$96 59. One day after date I promise to pay Hollingsworth & Sons or bearer $96 59, value received. Witness my hand and seal, this 16th day of February, 1836.

(Signed) W. B. MARTIN, [SEAL.]"

This note was read in evidence. The witness also proved that the plaintiff, after the above stated conversation, and before the commencement of this suit, produced to him a receipt in the words and figures following, to-wit:

"Rec'd, Tuskaloosa, February 11th, 1836, of H. L. Martin on account of W. B. Martin one hundred dollars.

(Signed) S. P. HOLLINGSWORTH."

The witness proved the execution of said receipt, and the same was read in evidence to the jury.

The above was all the evidence in the case.

The defendant asked the court to charge the jury, that, if they believed the evidence in this case, they must find for the defendant; which charge the court refused to give, and defendant excepted.

The defendant then asked the court to charge the jury, that, if they believed from the evidence that, at the time of the conversation herein above set out, the only indebtedness to plaintiff was for professional services rendered for the administrator of the estate of Benj. Hollingsworth or W. B. Hollingsworth, and that the promise of defendant was to pay the debt for the professional services above named, then that promise would be within the statute of frauds and void, unless in writing; which charge the court gave, but then went on to charge the jury, that, if the promise was to pay the amount of the receipt on the note given in evidence, upon its production, and if such a receipt had been produced, and if defendant had received satisfaction of the note in plaintiff's claim a second time, then the promise would not be within the statute of frauds, and plaintiff might recover; to which charge defendant excepted.

The defendant then asked the court to charge the jury, that a promise of S. P. Hollingsworth, the defendant, to pay the amount of a receipt for a payment made by plaintiff on the note in evidence held by him on plaintiff would be without consideration, if the only consideration for it was the indebtedness of the administrator of W. B. Hollingsworth or Benj. Hollingsworth's estate to plaintiff; which charge the court gave, but then charged the jury, that, if S. P. Hollingsworth was the agent of the administrator indebted to plaintiff, and if defendant was a member of the firm of Hollingsworth & Sons, and if defendant had received satisfaction of the note in plaintiff's claim a second time, then the consideration would be sufficient; to which charge defendant excepted, both because there was no proof of the agency, and because there was no proof that defendant had received satisfaction of the note in plaintiff's claim a second time, and because the charge was not the law.

The defendant asked the court to charge the jury, that the receipt given in evidence could not be deemed by them as being

for a payment on the note herein set out, unless there was proof extrinsic of the receipt connecting it with the note. The court gave the charge asked, and then charged the jury, that, if the receipt was in payment of the consideration for which the note was given, it would be sufficiently connected with the note, and would be such a compliance with the condition of the defendant's agreement as to authorize a suit by plaintiff against defendant; to which charge defendant excepted.

The defendant then asked the court to charge the jury, that the note was not evidence of any indebtedness previous to its date. The court gave this charge, but then went on and told the jury, that they might look to the facts that Hollingsworth & Sons were doing business in the town of Jacksonville in 1836, and that S. P. Hollingsworth was a member of the firm, and that plaintiff's brother, Henry L. Martin, was at that time living in Tuskaloosa, and that defendant passed through Tuskaloosa on his way to Texas, in determining whether the receipt was not in payment of the consideration on which the note was based, and whether one of the partners at Jacksonville had not taken the note from W. B. Martin at Jacksonville a few days after the receipt was given at Tuskaloosa by S. P. Hollingsworth; to which charge the defendant excepted.

The only error assigned is, "the matters appearing in the bill of exceptions."

A. J. Walker, for plaintiff in error:

1. There was but one witness examined. His entire testimony is set out in the bill of exceptions. There was no conflict of proof. Therefore it was proper for the court to charge the jury upon the effect of the entire evidence.

2. Upon the evidence given in, the plaintiff had no right to a verdict, and the court should have so charged the jury. The action was brought on a promise to pay an account of plaintiff for professional services rendered to the administrator of the estate of Benjamin Hollingsworth, or of the estate of Wylie B. Hollingsworth. It was not shown that the defendant was the administrator of either of those estates, nor was it shown that Martin's services were rendered at the request of defendant. Therefore Hollingsworth was not responsible for the account of Martin, unless his promise proved by Crow rendered him so.

3. The promise of Hollingsworth was upon the express condition that Martin should produce a receipt for the payment of the note. With this condition Martin had not complied. The receipt which he produced was not for a payment on the note. The receipt was for a larger amount than the note, and was of anterior date to the note. The receipt is by S. P. Hollingsworth. The note was payable to Hollingsworth & Sons. The production certainly did not *prima facie* show a payment on the note. There was no proof whatever connecting the receipt with the note. In the entire absence of proof connecting the receipt with the note, the court was bound to say that the plaintiff had failed to prove either a literal or substantial compliance with the condition upon which the promise was made.

4. The promise of Hollingsworth was without consideration. Conceding that it was proved that Martin had paid to Hollingsworth a debt due Hollingsworth & Sons, that was no reason why Hollingsworth should pay a debt due Martin by third persons. It was a mere voluntary assumption of another's debt.—Kirksey v. Kirksey, 8 Ala. 131; Hester v. Wesson, 6 *ib.* 415.

5. It is incontrovertibly established as law by the decisions, that the only consideration which will render a promise to pay the debt of another a new debt, is one which is beneficial to the promisor.—Martin v. Black's Ex'rs, 21 Ala. 730; Brown v. Barnes, 6 Ala. 694. There was certainly no consideration beneficial to Hollingsworth for the promise made by him.

6. The court not only predicates its charge upon a state of facts not in proof, but assumed the province of testifying to the jury through the medium of a charge. The court tells the jury "they might look to the facts that Hollingsworth & Sons were doing business in Jacksonville in 1836, that defendant passed through Tuskaloosa on his way to Texas, that different members of the firm received the money at Tuskaloosa and took the note in the record, and that the note was given at Jacksonville," when there was no evidence whatever, that Hollingsworth passed through Tuskaloosa on his way to Texas, or that the money was paid to him when on his way to Texas, or that the note was given in Jacksonville.

Belser & Rice, *contra:*

The agreement of the parties was, to consider a proper declar-

ation and proper pleadings as filed, and to try on the merits. The evidence shows a clear right of recovery on the part of defendant in error, and this court will not reverse, because, even if there was error, there was no injury. The evidence is not conflicting, but the uncontroverted admission and declarations of plaintiff in error show that he is liable. He admitted if Martin produced his receipt, he was "indebted to Martin to the amount of such receipt." This makes him liable, as Martin did produce his receipt.—Brooks v. Ball, 18 Johns. Rep. 337; McKeen v. Harwood, 15 Ala. Rep. 797.

The language employed in the last sentence of Brooks v. Ball, *supra*, applies with decisive force to this case, *mutatis mutandis*, to-wit: "He voluntarily waives all other proof" (except the production of the receipt;) and to allow him to make any other question afterwards, "would be allowing him to alter the conditions of his engagement and virtually to rescind his promise." He had collected the money once from the brother of the defendant in error, and he ought to be held to what he said.

GIBBONS, J.—The defence attempted to be interposed to the liability sought to be enforced against the plaintiff in error, is two-fold: 1st, the statute of frauds; and 2d, that the condition attached to the promise, as shown by the evidence, has not been complied with.

The defendant below, after the testimony was all in, and consisting as it did of the evidence of one witness alone, requested the court to charge the jury, that, if they believed the evidence, the plaintiff could not recover. This charge the court refused, and the defendant excepted. The refusal to give this charge, in our opinion, raises the same question as if the defendant below had demurred to the evidence, and called upon the court to declare the law thereon. The question thus presented involves the two-fold aspect of the defence above mentioned.

The plaintiff's right to recover under the proof must rest either upon the fact that he had performed services for one of the Hollingsworths' estate, or upon the promise that if Martin would produce the receipt of which he had spoken he would be indebted to him in that amount. The testimony is, that the plaintiff and defendant came into the office of witness together,

and then plaintiff claimed of defendant a certain amount of money for services rendered one of the Hollingsworths' estate. The defendant refused to pay the demand, because he held the note of the plaintiff for about the same amount. The plaintiff then said, he had paid the note, through Henry L. Martin of Tuskaloosa, to the defendant. The defendant left the note with witness, and stated that, if the plaintiff produced the receipt, he would be indebted to the plaintiff the amount thereof. The plaintiff afterwards did produce the receipt offered in evidence.

The evidence does not disclose who held the note at the time of trial; whether it was then in the possession of the plaintiff, or whether it was produced by the witness, it being still in his possession since it was left there by the defendant, does not appear. We think the legal presumption is, that the note yet remains in the hands of the witness, until the contrary is shown. Assume this to be the fact for the present, and assume further that the plaintiff based his right to recover on the fact that he had rendered services to the estate of one or both of the Hollingsworths. It is shown that the defendant was the agent of the administratrix of one of those estates, but we do not see how this changes the legal aspect of the case. It would seem clearly, on this hypothesis, to be a demand of the defendant that he should pay the debt or demand of a third person, and any parol promise which he may have made in reference to that demand would not be binding upon the defendant, unless the same was in writing, and upon a legal consideration. Our conclusion, therefore, is, that if the plaintiff had declared for those services against the defendant, the claim would have fallen within the statute of frauds.

But suppose the plaintiff does not rest his right to recover against the defendant upon the fact that he rendered the above mentioned services for one or both of the estates above mentioned, but relies upon the admission of the defendant, that, if the plaintiff produced the receipt spoken of by the witness, "he would be indebted to him" in the amount thereof. When the note and receipt are brought together they do not at all correspond; although we are bound, in the view of the case which we are now taking, to give the plaintiff the benefit of every conclusion which the evidence fairly tends to prove, still we do not see how we can legitimately refer the receipt to the note, or in any way

connect them together, as upon their face they are entirely incoherent. We are left solely to the conclusions which the law draws on the face of these two papers, as there is no testimony explaining the apparent incongruities, or in any manner connecting them, except the conversation detailed by the witness between the plaintiff and the defendant. On the face of the papers alone, we think the court was bound to say that they were wholly and entirely disconnected, as the receipt is anterior to the note by some five days in its date and for a different amount. It is true we may imply that the note and receipt were given for the same debt, but we cannot do so fairly from the evidence, because the law from the face of the papers draws a different conclusion. Besides, if we attempt to arrive at conclusions by implications, we may as well imply that Martin owed two debts, and that the papers above mentioned referred to those distinct debts, as that they referred to one and the same debt. We must confine our conclusions to those that the law draws from the papers themselves, until the apparent incoherence is explained by proof. This proof the record does not supply, and our conclusion is, that the charge asked should have been given to the jury as asked. This is decisive of the case so far as respects the reversal.

Several other errors are insisted upon in argument, but we do not deem it important to consider them in detail. We simply remark, that, in charging the jury, it is the duty of the court to confine itself to the testimony before it. The judge ought not to assume that any fact is proved, unless there is some testimony tending to prove it, and then it should be left hypothetically to the jury, leaving it for them to say whether such fact is proved or not, or whether or not they believe the evidence. As the same things will not probably arise on another trial, we forbear remarking further upon the other portions of the bill of exceptions.

Let the judgment of the court below be reversed, and the cause remanded.

COMM'RS' COURT OF BUTLER CO. *vs.* McCANN.

1. An action on the case cannot be maintained by the Commissioners' Court of Butler County against the keeper of the poor-house, for debauching and getting with child one of the inmates of said poor house.

ERROR to the Circuit Court of Butler.

The record does not show the name of the presiding judge.

THIS was a special action on the case by the plaintiff in error against James McCann, for debauching and getting with child one Elizabeth Rogers, who was an inmate of the poor-house of said county during the time said McCann was employed as the keeper of it. The declaration contains a second count, for so carelessly and negligently conducting as keeper of said poor-house, as to suffer said Elizabeth to be debauched and gotten with child, and alleges the damage as accruing from the increased expense by reason of her sickness and medical attendance, and for the support of the child.

The court sustained a general demurrer to the declaration, and this is now assigned for error.

WATTS, JUDGE & JACKSON, for plaintiff in error:

To show that the court erred in sustaining the demurrer, we make the following points and support them by the authorities cited:

1. By the act for the support of paupers in the County of Butler, (see Acts of 1844 p. 7,) the plaintiff was authorized to have erected a poor-house, and to employ some person to superintend said house, and take care of the poor of said county.

2. The plaintiff is a *quasi* corporation.—Angell & Ames on Corporations, 3 Ed. p. 19 § 5.

3. The power to sue and be sued is one of the incidental powers of all corporations. No express power to sue need be given by statute.—Angell & Ames on Corporations p. 372 § 1; *ib.* p. 82 § 6.

4. The giving of the bond by the defendant for the performance of his duties as poor-house keeper, was simply an additional security; and although an action might have been maintained

on the bond, (this however is doubtful,) for the cause alleged in the declaration, this right does not preclude the plaintiff from maintaining an action on the case, for the injury alleged to have been done by the defendant.

5. Causes alleged in the declaration are sufficient to support an action on the case.

ELMORE & YANCEY, *contra :*

The Commissioners' Court of Roads & Revenue of a county have neither general nor special authority to sue, in any matter touching the interests of a county.—1 Stewart 349.

The act of 1844, "for the support of paupers in the County of Butler," may be considered as constituting "the judge of the county court, and commissioners of roads and revenue for the County of Butler," a corporation; and all powers necessary to the execution of any privileges conferred by that act, will be presumed as granted.—4 Porter 370.

If, therefore, the grievance complained of is one that an action can be maintained upon under that act, the suit must be in the name of the corporate body, viz., "the judge of the county court and the commissioners, &c.," if the action is not upon the bond of the superintendent; and if upon the bond, it should be in the name of "the judge of the county court," to whom it is payable; for, in all actions by corporations, the true name thereof must be used.—Bacon's Abr., title "Corporations," letter "C," p. 444.

A corporation has no rights, save such as are specially granted, or as are incidental to or necessarry to give effect to granted powers.—The State v. Mayor &c., 5 Porter 279, 310.

There was no obligation upon the plaintiff to maintain the paupers.—Clay's Digest p. 492 § 2; Act of 1844 § 4.

If this is an action for breach of duty, then it should have been in debt or covenant on the bond required to be taken, being its highest security.—Act of 1844.

If it is an action for seduction, *per quod servitium amisit*, then it is not maintainable, for there is no allegation in the declaration that the relation of master and servant existed.—14 Ala. 235; 2 Green. Ev., title Seduction.

The relation of master and servant does not exist between the plaintiffs and paupers in Butler.—Act of 1844 § 3.

This action could only be maintained by the individual seduced, or by her parents or husband.

If any injury has been done, it was injury not to the plaintiff, but the county, and therefore suit could only be instituted for the use of the county.—Clay's Dig. 494 § 11.

Overseers of the poor of a town have no right of action against one who, against law, brings a pauper into the town by which the town is put to expense.—11 Johns. 183.

CHILTON, C. J.—That the declaration in this case presents a flagitious violation of duty on the part of the defendant, arising out of his contract as superintendent of the poor-house, there can be no question, but it is insisted that no action lies on the part of the Commissioners' Court to recover for it.

It is very clear that no action on the part of the Commissioners' Court could deprive the unfortunate subject of the injury of her action, or whoever may be entitled under the circumstances to sue for the seduction; but conceding this, the question recurs, can the Commissioners' Court recover the additional expense incurred by the county in medical bills and superadded attention required on account of the injury.

In Anthony v. Slaid & Wife, 11 Met. Rep. 290, the declaration averred that the plaintiff had contracted for the support of all the poor in the town of Adams, at a fixed sum per annum, and undertook to support them at his own risk in sickness and in health; and that the defendant's wife committed an assault and battery upon one of the town paupers, by means of which he was hurt, and the plaintiff was thereby put to increased expense for his cure and support. The Court of Common Pleas held, that the action was not maintainable. On error to the Supreme Court, it was held that the decision was right. Shaw, C. J., in delivering the opinion, said, "It is not by means of any natural or legal relation between the plaintiff and the party injured, that the plaintiff sustains any loss by the act of the defendant's wife, but by means of the special contract by which he had undertaken to support the town paupers. The damage is too remote and indirect."—See also Lamb v. Stone, 11 Pick. R. 527, and Crouse v. Overseers of the Poor, 11 Johns. R. 167 mar.

The foregoing cases are quite persuasive to show that the ac-

tion is not maintainable, but we prefer to rest our decision on a point less doubtful, and to leave this question undecided.

The act "for the support of paupers in the County of Butler" requires, "that before any superintendent shall enter upon the duties of his office, he shall enter into bond, with two or more good securities, in the sum of one thousand dollars, payable to the judge of the County Court of Butler County and his successors in office, conditioned for the faithful discharge of the duties of his office."—Acts '44 p. 7.

This provision seems to indicate the intention of the legislature to confer the legal right of action upon the county judge, and not upon the Commissioners' Court of Roads and Revenue. Be this, however, as it may, it is clear that no action could be maintained on the bond, except in the name of the county judge, who is the payee.

The duty alleged in the declaration to have been violated arises out of the contract, and this action to recover for a tortious violation of it, although in form *ex delicto*, is nevertheless, in fact, in the nature of an action *ex contractu*. The party entitled to sue has his election, either to proceed on the contract to recover for the injury, or to treat as a tort the violation of the duty which the law implies as arising out of the contract, and sue in case. The actions in the given case are concurrent, the one direct upon the contract, the other collateral to it, but both dependent on it; and the party who is legally entitled to sue on the contract can alone maintain the collateral remedy.

In Tollit v. Sherstone, 5 Meeson & Wel. R. 283, this question came before the Court of Exchequer, and it was held to be a clear proposition of law, "that an action of contract cannot be maintained by a person who is not a party to the contract; and that the same principle extends to an action of tort arising out of a contract."

If it be granted that, whether the action be brought in the name of the judge, or of the Commissioners' Court, the recovery would enure to the benefit of the county, still this does not obviate the necessity of suing in the name of the party having the *legal* right of action. Besides, this suit is not brought for the use of the county, and the Commissioners' Court has no beneficial interest.

Our conclusion therefore is, that the Commissioners' Court have no legal right of action, and hence the demurrer to the declaration was properly sustained.

Let the judgment be affirmed.

HOLLEY *vs.* ACRE, JUDGE, &c.

1. In debt on an administrator's bond, a count on the penalty alone, not noticing the condition, is sufficient.
2. A decree of the Orphans' Court in favor of a distributee for a balance found in the administrator's hands, is evidence of assets in his hands to that amount, and sufficient to sustain a judgment on the bond against his sureties.

APPEAL from the Circuit Court of Covington.

Tried before the Hon. ANDREW B. MOORE.

SUIT was brought in the court below by the appellee, for the use of Benjamin J. Hogg, against the appellant, as surety on an administrator's bond, made by Benj. L. Jordan and Elizabeth Hogg, as administrators of the estate of Benjamin Hogg, deceased. The declaration originally contained three counts, the first on the bond, properly setting it out, averring that the penalty was due and unpaid, although it had been demanded. It is unnecessary to describe the other two counts, as a demurrer was sustained to them, and the plaintiff below relied on the first count alone. There was a demurrer also to this count, but it was overruled by the court.

The defendant then craved oyer of the bond in the declaration mentioned, and pleaded covenants performed. To this plea the plaintiff replied, setting out the condition of the bond, and assigning as a breach of such condition, "that on the 8th day of October, 1838, the said Benj. L. Jordan, administrator as aforesaid, appeared before Josiah Jones, Judge of the County and Orphans' Court of Covington County, at an Orphans' Court then held for said county, and presented his accounts and vouchers to the said court for final settlement of the estate of

said Benjamin Hogg, deceased; and upon such final settlement, so made by said administrator, it was ordered and decreed by said court that said Benjamin L. Jordan do pay over to each of the heirs, viz., Louisa Hogg, Sarah Ann Hogg, Benj. J. Hogg, Martha M. Hogg, Cloe E. Hogg, Wm. A. Hogg and Holland M. Hogg, the sum of $75 38; and the plaintiff in fact says, that the said Benjamin L. Jordan, administrator as aforesaid, has not paid the said sum of money, so ordered and decreed to be paid, or any part thereof, but has neglected and refused to do so, and still refuses, although a larger sum of money, to-wit: the sum of $1460 37, came into his hands as such administrator, and that the sum so decreed to Benj. J. Hogg remains unpaid and unsatisfied."

To this replication the defendant rejoined *nul tiel record*, payment and the statute of limitations. On these rejoinders issues were formed, and the court tried the plea of *nul tiel record*, and decided the issue on that rejoinder for the plaintiff. The other issues were submitted to a jury.

On the trial of these issues, as appears by the bill of exceptions, the plaintiff offered in evidence a transcript of the proceedings of the Orphans' Court, on the final settlement of the estate of Benjamin Hogg, deceased, by which it appears that on the 14th of August, 1838, on the application of Benjamin L. Jordan, administrator of Benjamin Hogg, deceased, an order was made appointing the second Monday in October, 1838, as the day on which the administrator would make final settlement of said estate, and ordering forty days' notice to be given to the parties in interest.

It further appears that on the 8th day of October, 1838, a settlement did take place, on which it was found that the administrator had received $1460 67 on account of said estate, and, after allowing him all credits, there remained in his hands $659 66, which he was ordered to pay out to the widow and children of the intestate, including Benjamin J. Hogg. This last order recites that it is made on an application for distribution, and that the widow and seven children of the deceased are entitled to the fund, and order the administrator to pay to the widow $131 93, and to each of the children $75 34.

To the introduction of this transcript, the defendant objected, but his objection was overruled, and he excepted.

The plaintiff introduced the bond described in the declaration, which was read without objection, and, with the transcript from the Orphans' Court, was all the proof in the case. The defendant then asked the court to charge the jury, that if they believed the whole of this proof, they could not find for the plaintiff; this charge the court refused, and charged the jury that on the proof they must find for the plaintiff the amount of the decree rendered in the Orphans' Court, with interest from the time of its rendition to the time of trial.

The defendant excepted to the charge refused, and to the charge given.

The errors assigned in this court are:

1. That the court erred in admitting the record of the Orphans' Court, as evidence under the declaration and replication;

2. In overruling the demurrer to the first count of the declaration;

3. In deciding the issue of *nul tiel record* for the plaintiff;

4. In refusing the charge asked by the defendant;

5. In the charge given.

WATTS, JUDGE & JACKSON, for appellant:

1. The proceedings of the Orphans' Court showed no decree.—Hinson v. Wall, 20 Ala. 298, and authorities there cited.

2. The decree of the court, ascertaining the balance due each heir, is void, because made at a time when the law did not authorize it, and when the administrator was not present. The law required the judge to audit and report the accounts, and after forty days' notice to render the decree.—Aiken's Digest 182 § 27. This decree was made on the same day that the accounts were presented and audited. The administrator was not before the court on that day, for any other purpose than to have his accounts presented and audited. All that was done by the court besides this, was done in the absence legally of the administrator. The judge had no power to make a final settlement on that day, and his decree is therefore void.—Brazier & Co. v. King, 16 Ala. 730.

3. The sureties of an administrator shall not be charged beyond the assets of the estate.–Clay's Dig. 228 § 34. The proof set out in the bill of exceptions, which was all the proof given,

did not show that any assets had come to the hands of the administrator, so as to charge his surety therewith. Something more than the decree against the administrator was required to be shown, to charge the surety.—Dean v. Portis, 11 Ala. 104; Miller v. Gee, 4 Ala. 359; Thompson v. Searcy & Fearn, 6 Porter 393. These authorities show that the charge asked should have been given, and that the charge given was erroneous.

4. The demurrer to the first count should have been sustained. It is entirely too general.

5. The cases of Townsend v. Everett and Howell v. Williamson are not at all applicable to this case.

6. All the assignments of error are insisted on.

Belser & Rice, *contra:*

1. The practice of this court is, to examine such errors only as are insisted on by the argument of the counsel of the plaintiff in error.—Cunningham v. Carpenter, 10 Ala. Rep. 109.

2. The first position assumed by the plaintiff in error is not maintainable, for the proceedings of the Orphans' Court do show a decree. On the 14th August, 1838, the administrator voluntarily "made application to the court to make final settlement," &c., whereupon an order was made requiring forty days' notice to be given &c., and fixing the second Monday in October next thereafter as the day for the final settlement. On said second Monday in October, (the 8th October, 1838,) the administrator "presented his account and vouchers for a final settlement, &c., and thereupon on the accounts and vouchers of the administrator himself, the court, upon examination thereof, declares it finds "the gross amount of said estate to be fourteen hundred and sixty six dollars and sixty seven cents," &c. &c., and after making all the allowances claimed by the administrator "there is found to be in the hands of said administrator, as net estate, the sum of six hundred and fifty nine dollars and sixty six cents," and that there were eight heirs entitled to distribution, including the widow. The share of the widow was ascertained—the share of each heir was ascertained, the name of each heir is stated, and an order was made that the administrator pay over to each heir said ascertained share, stating the sum in *numero;* the administrator being then in court.—Rhodes v. Turner, 21 Ala. Rep. 210; Sankey v. Sankey, 18 Ala. Rep. 713.

3. The second position assumed by plaintiff in error is equally unsound. The decree was not void, because it is certain the court rendering it had jurisdiction. It cannot be impeached collaterally, even if it were erroneous. It cannot now be reversed, because by lapse of time a writ of error is barred. The decree, even if erroneous, is conclusive on the administrator and his sureties.—Williamson v. Howell, 4 Ala. Rep. 693.

4. The third, and last position assumed by plaintiff in error, can be easily answered. The proof shown in the bill of exceptions, to-wit: the decree of final settlement made on the application of the administrator himself, and on his account and vouchers, clearly shows assets of the estate in his hands greatly beyond the judgment recovered in this case. This decree, this account and these vouchers, are evidence against the sureties, (the plaintiffs in error.)—Townsend v. Everett, 4 Ala. R. 607; Williamson v. Howell, 4 Ala. R. 693; Howell v. Williamson, 14 Ala. R. 419.

LIGON, J.—1. The second assignment of error is the first in order, and as such will it be examined. The first count of the declaration proceeds for the penalty of the bond alone, and is in the usual form of a declaration on a penal bond. It is therefore faultless, and the demurrer to it was correctly overruled.

2. The transcript of the proceedings in the Orphans' Court, which was offered in evidence under the issue tendered by the rejoinder of *nul tiel record*, to the replication of the plaintiff, was pertinent to that issue, and should not have been rejected.

The defendant had pleaded covenants performed, to which the plaintiff replied the condition of the bond, and proceeded to assign breaches. In this replication he averred that the administrator had made a final settlement of the estate with the Orphans' Court on the 8th of October, 1838, and on that settlement a balance was found in his hands, which the court proceeded to distribute among the parties entitled, and rendered a decree in favor of the usee in this suit and others, for the sum of $75 39 each, which the administrator failed and refused to pay; to this replication the complainant rejoined *nul tiel record*. The transcript offered fully sustains the replication, and shows assets in the hands of the administrator sufficient to pay the sum sued

for; and it further shows the extent of Benjamin J. Hogg's interest in these assets. This is sufficient to entitle him, (the sum to which he was entitled being unpaid,) to an action on the bond, against the sureties of the administrator, for a decree of the Orphans' Court against the administrator is conclusive on his sureties.—Kyle v. Mays, use of Pond, 22 Ala. 692; Lampkin v. Heyer, 19 Ala. 228.

It is urged, however, that the final settlement and decree set out in the transcript are irregular. Suppose this were conceded, still it will not aid the appellant. Mere irregularities in a judgment or decree will not render it void, and for this reason it cannot be collaterally impeached; and if the party to it, who complains of such irregularity, desires to take advantage of it, he must do so by a direct proceeding. If, as in this case, he fails to do so until his writ of error is barred by the statute of limitations, the party claiming an interest under it will not be defeated in his recovery when he seeks it in proper form, on account of such irregularities.

3. The record from the Orphans' Court being admitted, the judgment of the court on the issue of *nul tiel record* is proper, for the record described in the replication corresponds substantially with the one offered in evidence.

4. Neither can we perceive any error in refusing the charge requested by the defendant. The plaintiff had read the bond in evidence to the jury, containing a condition for the faithful discharge of all the duties of administrator of the estate of Benjamin Hogg, deceased, and showing that the defendant was his security. He had also shown by the record of the final settlement in the Orphans' Court that the administrator had funds in his hands which he was ordered to pay to the use of the plaintiff, and no proof being offered to show this payment, it would have been gross error to have given the charge requested.—Kyle v. Mays, use &c., *supra*.

5. The charge given was in every respect proper. The plaintiff had made out his right to recover, fixed the amount of his demand, and the date at which it should have been paid, and his right to interest is unquestionable. As there was no conflict of testimony, it was proper for the court to charge in the language it did.—Kyle v. Mays, use &c.

There is no error in the record, and the judgment is affirmed.

PRICE ET AL. *vs.* PRICE'S ADM'R.

1. A decision of the Supreme Court is conclusive of the law of the case in which it is made, and its correctness will not be inquired into when the case is brought up again.
2. A contingent remainder in slaves may be created by deed.
3. A sale by one having a life estate in slaves does not destroy a contingent remainder limited thereon.

ERROR to the Circuit Court of Jackson.

Tried before the Hon. GEORGE GOLDTHWAITE.

DETINUE by the plaintiffs in error against the administrator of Meredith Price, deceased, for certain slaves. The plaintiffs claimed as heirs at law of Polly Woods, under a deed of gift from Richard Price, her father, conveying the mother of the slaves in controversy to the said Polly "during the natural life of the said Polly and her present husband, Drury Woods, or the survivor of them; and at the death of said Polly and Drury Woods the said negroes, with their increase, are to be returned and delivered to the right and legal heir or heirs of the said Polly Woods; it being the intention of this instrument to convey a life estate in said slaves to my said daughter and son-in-law." The defendant relied on a deed of bargain and sale from said Richard Price, Drury Woods and Polly Woods, to his intestate, dated March 27, 1826.—See 5 Ala. 578, and 10 Ala. 946.

The plaintiffs proved the execution of said deed of gift, that they were the heirs at law of said Polly Woods, who died in 1835 in the life-time of her husband, said Drury Woods, without having had any children; also, that the slaves in controversy were the children of one of those mentioned in said deed, and that defendant's intestate had possession of them at and before the commencement of this suit. The defendant then introduced and proved said deed from Richard Price, Drury Woods and Polly Woods to his intestate.

Upon this evidence, the court charged that, under said deed of gift from Richard Price, plaintiffs took nothing but a contingent remainder; and that if Drury Woods, in the life-time of said Polly Woods, sold said negroes to the defendant's intestate,

the contingent remainder was destroyed, and plaintiffs were not entitled to recover. Plaintiffs excepted to this charge, and they now assign it for error.

JAMES ROBINSON, for plaintiffs in error:

In Price v. Price, 5 Ala. 578, it was held, in construing this deed, that the fact that the remainder was to the heirs of Polly Wood, who were not the heirs of her husband Drury, withdrew the deed from the operation of the rule in Shelley's case; and that, therefore, Drury Woods did not take an absolute estate, but only an estate for his life. The extent of Drury's interest was the only question then before the court, and so far as that point is concerned, that decision is conclusive. But it is not conclusive of any other point, for the court could not legitimately go beyond the only point raised, and the only one necessary to be decided.

If this remainder be a contingent one, it falls within Mr. Fearne's fourth class, that is, where the remainder is limited to a person not ascertained, or not in being, at the time such limitation is made.—Fearne on Remainders 9. Until the death of Polly Woods, it could not be ascertained who would sustain the relation of heir to her; but on her death, this person was ascertained, and the remainder vested in him. If this be so, the remainder vested in the present plaintiffs, who are her heirs at law.

The sale of the property by Drury Woods, the tenant for life, did not destroy or affect this remainder. A bargain and sale conveys no greater interest than the tenant for life has.—Fearne on Remainders 321, ch. 5; Lyde v. Taylor, 17 Ala. 273; Jones v. Hoskins, 18 Ala. 493, and cases there cited.

BRICKELL & CABANISS, *contra*.

GOLDTHWAITE, J.—When this case was last here, 5 Ala. 578, it was held, that the legal effect of the deed set out in the record was, to give Drury Woods but a life estate in the slaves conveyed by it, with a contingent remainder to the heirs of Polly Woods, which vested upon her death before the determination of the particular estate. It is unnecessary to inquire into the correctness of this decision upon the point which relates to the

interest taken by Drury Woods under the deed, as it is a sufficient answer to the argument of the counsel upon that question to observe that, under the precedents which have been long established in this court, we are bound to regard the decision as conclusive of the law in the case in which it was made.—Meredith v. Naish, 4 S. & P. 59; Gee v. Williamson, 1 Port. 313; Goodwin v. McGehee, 15 Ala. 232.

If Drury Woods took but a life interest in the slaves, it follows necessarily that the decision was correct as to the interest conveyed by the deed to the heirs of Polly Woods. The rule of the English courts, that personal property cannot be limited by deed after an estate for life, has not been followed in relation to slaves in several of the States, (Horne v. Gartman, 1 Branch 63; Duke v. Dyches, 2 Strobh. Eq. 353; Robinson v. Schley, 6 Geo. 515; Greene v. Boone, 5 B. Monroe 554;) and was recognized as the law in this court in Catterlin v. Hardy, 10 Ala. 511, Gill v. Tittle, 14 Ala. 528; and at the present term of this court in the case of Mason v. Williamson, it was expressly decided that a contingent remainder may be created in slaves.

The only remaining question left open upon the record before us is, whether the sale made on the 27th March, 1826, to the defendant's intestate, had the effect of destroying the remainder. What was said by the judge who delivered the opinion in this case in 5 Ala., *supra*, as it was not presented by the record, or necessary to the decision of the case as then presented, must be regarded as *dictum* merely. It is certain that in remainders proper of real estate dependent upon a contingency, the disposition of the particular estate, to annihilate the remainder, must be of a character which destroys the former. Thus the particular estate in the tenant for tail, or for life, might be destroyed by a feoffment or fine; for these conveyances gain a fee by disseizin, and leave no particular estate *in esse*, or in right, to support the contingent remainder, (Archer's case, 1 Co. 66; Chudleigh's case, 1 Co. 120, 137 *b*; Purifoy v. Rogers, 2 Len. 39; 4 Kent 253;) but a bargain and sale, or lease and release, could not bar a contingent remainder, for the reason that they passed no greater estate than the grantor might lawfully have conveyed.—Fearne on Rem. 321; 4 Kent 255. Here the sale of the slaves was made by the party holding the life interest, and its effect was simply to convey to the purchaser the life in-

terest which the seller had. It could pass no greater interest than he could lawfully have conveyed, (Lyde v. Taylor, 17 Ala. 273; Jones v. Hoskins, 18 Ala. 493,) and consequently could not operate to defeat the remainder.

The charge of the court below was in conflict with our views upon the last point, and for this error the judgment is reversed, and the cause remanded.

CHILTON, C. J.—I concur in the conclusion above attained. The rule that a particular estate is requiredto support a contingent remainder is founded upon feudal reasons, which have no application to personal property, and no such estate is necessary to support such remainder in chattels.

CARTER *vs.* CORLEY, USE &c.

1. The act of 1839 authorizing relinquishments of dower by deed of husband and wife, attested by two witnesses, (Clay's Digest 174 § 10,) embraces femes covert who reside out of the State as well as residents.
2. A tender by the vendor of a deed signed by himself and wife, and attested by two witnesses, is sufficient; it is the duty of the vendee to have it probated, if he wishes it.
3. When an attesting witness to a deed subsequently acquires an interest in the note given for the purchase money, this does not affect the validity of his attestation.
4. When a note is payable at a specified day for a sum certain which may be discharged by the payment of a less sum at an earlier day, the greater sum is not in the nature of a penalty, but is the debt actually due, and is recoverable if the less sum is not paid according to the terms of the note.

ERROR to the Circuit Court of Tallapoosa.

Tried before the Hon. ROBERT DOUGHERTY.

ASSUMPSIT by Elijah Corley, for the use of William Townes, against David Carter, on a note which is copied in the opinion. The plea was the general issue, with leave to give any special matter in evidence.

On the trial, the plaintiff read the note in evidence to the jury, and then introduced a patent from the United States to himself for the land mentioned in the note, and a deed for the same land from himself and wife to defendant, attested by two witnesses. He also proved that the defendant had gone into the possession of said land, and still retained it; that he tendered said deed to the defendant, and demanded the purchase money specified in the note; and that defendant objected to receiving said deed in the form in which it was written and signed, and with the probate thereon endorsed, and refused to pay said money.

The defendant then proved that said plaintiff resided in the State of Georgia at the date of said deed, when and where it was executed, and that he had departed this life in said State about nine months before the trial; that William Townes, one of the attesting witnesses to the deed, who proved its execution, is the person for whose use this suit is brought.

This was all the evidence in the cause, and the defendant asked the court to charge the jury, first, that, if they believed all the evidence, plaintiff could not recover; and secondly, that, if plaintiff was entitled to recover at all, he could not recover more than one hundred and twenty-five dollars, with interest from January 1, 1851. The court refused these charges, and instructed the jury, that, if they believed the whole evidence, plaintiff was entitled to recover one hundred and fifty dollars, with interest from January 1, 1851.

The defendant excepted to the refusal of the court to charge as requested, and to the charge given, and he now assigns them for error.

Belser & Rice, for plaintiff in error.

Carter contracted with Corley for a full title, which means a perfect one.—Parks v. Brooks, 16 Ala. 537; 1 Sugden on Vendors 340. Dower is an incumbrance on land, and where it is not properly relinquished, the vendee has not a perfect title.—A full title is subject to no contingency within the range of probability.—16 Ala. 538, *supra*; Porter v. Noyes, 2 Green. 22; Clarke v. Redman, 1 Black 379; 11 Johns. 525; 8 Ala. 373.

The deed is not executed according to the form required by

our laws for the conveyance of real estate, being made out of Alabama and by non-residents. Under such an instrument the fee does not pass.—Oakey v. Bennett, 11 Howard's U. S. R. 46. Mrs. Corley's dower was not properly relinquished. The act of 1839 does not apply to conveyances made out of the State, but the act of 1840 does. Townes, for whose use the suit was brought, and who proved the execution of the deed, was not a credible attesting witness within the meaning of the act, because of his interest in the cause.—Clay's Digest 174 § § 9, 10, 11.

The attempted probate of the deed is void ; it is without form or substance, and shows no sealing or delivery of the deed.

LEFTWICH, *contra :*

A note for a sum certain, payable at a future day, which may be discharged by the payment of a less sum at an earlier day, is valid, and the larger sum is not penalty.—Gordon v. Lewis, 2 Stewart 426.

The patent was properly admitted in evidence.—Hines v. Greenlee, 3 Ala. 73.

The deed was executed precisely in the mode pointed out by statute.—Clay's Digest 174 § 10.

The execution of the deed, when properly made, operates as a bar, and not the registration of it.

PHELAN, J.—Corley (use of Townes) sued Carter on the following note:

"On the 1st of January, 1850, I promise to pay Elijah Corley, or bearer, the sum of one hundred and fifty dollars for value received. but if paid the first day of January next, one hundred and twenty-five dollars, it being for land, when I get a full title to the north-east quarter of section nine, in township twenty-two, of range twenty-one, this, 30th day of March, 1849. (Signed) DAVID CARTER."

The defence set up against the payment of this note, that the wife's dower was not properly relinquished to the land for which it was given when the deed was tendered, cannot be supported.—The deed purports on its face to have been executed by the wife, together with her husband, in the presence of two witness-

es, and no question was made respecting the genuineness of the signatures either of the grantors or the witnesses. This, by the act of 1839, (Clay's Digest 174 § 10,) makes the relinquishment valid and the bar of dower complete; for the statue says, "*any* feme covert." That statute was evidently passed to facilitate relinquishment of dower to lands in this State, and embraces as well *femes covert* residing out of this State as those residing in it. It intended that a man living in Alabama, who wished to purchase a tract of Alabama land, of a married man residing out of the limits of the State, might (if he saw proper) carry his witnesses with him, who might attest the deed in the foreign State, and prove its execution before the tribunals of Alabama, either for record or any other purpose.

The probate of the deed which was made before Ware, the Alabama justice of the peace, and which was endorsed on the deed at the time it was tendered, was too defective to amount to such a certificate of probate as the law requires; but the grantor was under no obligation to furnish a probate. If the deed was signed by himself and wife, and attested by two witnesses, that was sufficient on his part; that made in law a valid deed from husband and wife. If the grantee wanted it put on record, it was his business to have that done, by calling the witnesses and making the proof for his own benefit.

Although the suit is brought for the use of Wm. Townes, who is one of the attesting witnesses to the deed which Corley and his wife signed, it does not appear that he had any interest at the time he attested the deed; and if not, an interest subsequently acquired in the note given for the purchase money, could not affect the validity of his previous attestation. The grantee in the deed had an interest in that act, and in his testimony to it, if required afterwards, which he had no power to destroy even if he desired to do so.—3 Phillip's Ev. 1266 *et seq.*

We have heretofore decided, that in a note made after this form, where a greater sum may be discharged by the payment of a less sum at an earlier day, the greater sum will not be considered in the nature of a penalty, but the debt actually due, and is recoverable if the less sum be not paid according to the terms of the note.—Jordan v. Lewis, 2 Stew. 426.

There was no error in the charge given, or in the refusal to charge as requested, and the judgment below is affirmed.

THRASHER AND MITCHELL *vs.* PINCKARD'S HEIRS AND ADMINISTRATORS.

1. An outstanding right of dower, whether perfect or inchoate, is an incumbrance upon a title which renders it defective; and a vendee who has contracted for "good and lawful titles," may come into equity to have compensation for such dower claim out of the unpaid purchase money.
2. The court of probate can only allot dower in the mode prescribed by the statute, and in those lands of which the husband died seized; if the husband aliened in his life-time, and the purchaser has put valuable improvements on the lands, he may come into equity against his vendor's widow and heirs, to have the dower claim settled and deducted from the unpaid purchase money

ERROR to the Chancery Court of Chambers.

Heard before the Hon. W. W. MASON.

THIS bill was filed by the plaintiffs in error, Jno. J. Thrasher and Peter Mitchell, against the widow, heirs at law and personal representatives of Peyton Pinckard, deceased. It alleges that said Thrasher, one of the complainants, on the 10th day of November, 1849, contracted with said Pinckard for the purchase of certain tracts of land in said bill specifically described, for which he agreed to pay to the said Pinckard the sum of $2250, and in payment of the purchase money the said Thrasher executed to the said Pinckard two notes, one for the sum of $1000, falling due on the 25th December, 1849, and the other note for $1250, falling due on the 25th December, 1850, with interest from the 25th December, 1849; that said Pinckard, on the said 10th day of November, 1849, made and executed to the said Thrasher his bond, in the penal sum of $4500, conditioned to make to the said Thrasher or his assigns "*good and lawful titles*" to said lands, on the payment of the purchase money, and on the further condition, that he was to give to the said Thrasher, his heirs or assigns, the possession of the said premises on the said 25th day of December, 1849, at the maturity and on the payment of the first of the above described notes; that said note was paid by said Thrasher at its maturity, and he went into possession of the said premises according to the terms of the said agreement; that before the second note ma-

tured the said Peyton Pinckard died, intestate, upon whose estate Evan G. Richards and Martha E. Pinckard, widow and relict of the said Pinckard, deceased, have taken letters of administration, and are administrator and administratrix of said estate; that the other parties defendants are the lawful heirs of the said Peyton deceased.

The bill further alleges, that the said Thrasher, on the 3d day of September, 1850, and before the maturity of the second of the above described notes, assigned and transferred all his rights and interests, in and under the said bond for titles, to the other complainant, Peter Mitchell; that since the death of Peyton Pinckard, the defendant Martha E. Pinckard has proceeded by petition in the Orphans' Court of Randolph County, Ala., to demand her right of dower in the premises in question, and demands one third of the same by metes and bounds, for the term of her natural life, and is now prosecuting her suit in the court aforesaid, against the complainant Mitchell, who is in possession of the land, for the recovery of her dower as aforesaid; that the complainant Mitchell has paid up all of the last note, except $1000, and has tendered the payment of that upon the condition that he could get a title for the land, with a relinquishment of the dower claim by the said Martha E. Pinckard, widow and administratrix as aforesaid; but that she and the other administrator refuse to receive the money on those terms, and refuse to make the relinquishment of dower as demanded by complainants, without a further payment of $2000, over and above the payment of the purchase money agreed to be paid for said lands. Complainants offer to the court to pay the entire amount of the purchase money agreed to be paid for the land, if they can receive such a title as they insist they have a right to call for under the bond which they hold of the said Peyton Pinckard, deceased.

They further allege that the said administrator and administratrix have commenced suit in the Circuit Court of Chambers County against the complainant Thrasher, to recover the balance yet remaining unpaid on said note, and insist that they have the right to collect the entire balance remaining unpaid on said notes, notwithstanding the said Martha E. is prosecuting her claim of dower in the manner above stated, and notwithstanding the complainants have offered to pay the money on receiving the

title which they contend was stipulated for in the said bond.

They further allege that, since the premises in question have passed into the possession of the complainants, they have made material and valuable improvements thereon, such as would make it impossible for any court to set off dower by metes and bounds, and do justice between the parties, and that full justice could alone be done, by equitable compensation being made to the demandant in lieu of dower by metes and bounds; that the Probate Court of Randolph County has no power to render such a judgment or decree in the premises as the nature of the case and the peculiar circumstances demand.

The bill prays an injunction, to stop the further prosecution of the suit at law on the note, and if the dower claim is insisted on, and allowed, that compensation be made out of the purchase money unpaid for such claim; and also that the further proceedings in the dower suit pending in Randolph County be arrested, and that the demandant be compelled to come before the court of chancery to further prosecute her claim for dower, if any such she has, and for general relief.

The injunctions were awarded according to the prayer of the bill. The administratrix filed an answer to the bill, but, as no question arises thereon, it is not deemed necessary in any manner to notice it.

At the May term of the Chancery Court for Chambers County, a motion was made to dismiss the bill for want of equity, which motion prevailed.

From this decree a writ of error is prosecuted, and it is here assigned for error.

John T. Heflin, for plaintiffs in error:

There is equity in the bill, and a court of chancery alone is competent to do justice between the parties; the injunction ought to be retained, to prevent injury and circuity of litigation. An account will have to be taken; and where matters of account are to be settled in dower suits, chancery is the proper forum.—Smith v. Beavers & Jemison, 11 Ala 20; 17 Ala. 296; Herbert v. Wren, 7 Cranch.

An inchoate right to dower attaches upon marriage, and is an incumbrance upon the title, for the removal of which the aid of a court of equity may be invoked. It is the duty of the owner

of the fee to have dower assigned, and he may become the actor in such proceedings, and an alienee of the husband may resort to equity for that purpose.—Barnett v. Gaines, 8 Ala. R. 373; Parks v. Brooks, 16 *ib.* 529; Shelton v. Carroll, 16 *ib.* 148.

Courts of equity recognize rights, and administer remedies, where courts of law do not recognize such rights, or if recognized they are left to the conscience of the party.—Kennedy v. Kennedy, 2 Ala. The demandant can only assert a right of dower, subject to the equity of the complainants, and in the mode least injurious to their rights.—Fry v. Merchants' Insurance Co., 15 Ala. 810.

The land owned by the husband at his death, should have been allotted to the demandant, and she cannot claim dower in lands aliened by the husband, until the lands owned at his death are exhausted.—6 Dana 471; 4 Wash. C. C. R. 305.

In this case the complainants are entitled to the relief they seek. When the husband of the demandant died, the time had not arrived when the purchasers by the contract could protect themselves against a claim of dower by a conveyance or release, yet there was a right in equity to the land from the time of the purchase, and upon payment of the purchase money, (the last note for which did not fall due until after the vendor's death,) to a conveyance of the title free from dower and all other incumbrances.—17 Ala. 295; Burlace v. Cook, 2 Freeman's R. 24; Jerrard v. Saunders, 2 Ves. Jr. 454; Paine v. Compton, 2 Y. & Coll. 457; Parker v. Blythemore, 2 Eq. Ab.

The Court of Probate, if it has jurisdiction at all in a case like this, to entertain a petition, and hear and determine a claim for dower, in lands aliened by the husband, is incapable from its limited jurisdiction of doing justice to the parties.—Barney v. Frowner & Wife, 9 Ala. R. 901; Nance v. Hooper, 11 Ala. Rep. 552.

Richards & Falkner, *contra:*

1. The bill discloses no sufficient reason for resorting to a court of chancery. The estate of Pinckard being solvent, the complainant's remedy is by an action at law upon the bond.—McLemore v. Mabson *et al.*, 20 Ala. 137; Parks v. Brooks, 16 *ib.* 529; Cullum v. Br. Bank, 4 *ib.* 21; Goodwin v. McGehee, 15 *ib.* 233.

2. The court cannot compel the widow to take dower in money, as there is no special reason (such as the law recognizes) shown to authorize it.—Beavers & Jemison v. Smith, 11 Ala. 20, and authorities there cited.

3. There is no averment in the bill that the estate of Peyton Pinckard is insolvent, or unable to respond in damages, or other sufficient reason for holding to the possession of the premises; and there is no offer in the bill to rescind the contract; and complainants having a clear legal remedy at law, the bill was properly dismissed.

GIBBONS, J.—According to the views which we entertain of the case presented by the bill, the decision of the Chancellor in dismissing it for want of equity cannot be sustained. It will be recollected that, on a motion to dismiss for want of equity, all the allegations of the bill are to be taken as true. Adopting this rule, under previous decisions of this court, the bill, taken as a whole, presents two distinct grounds of equity, each of which is sufficient to give the court jurisdiction of the case.

The counsel engaged in the argument of the cause seem to differ as to the extent of the covenant for title found in the bond of P. Pinckard, deceased. The obligor in this bond binds himself to make "*good and lawful titles*" on the payment of the purchase money according to the terms of the stipulation.—This covenant undoubtedly binds the obligor to convey a title free from incumbrances, and a right of dower outstanding, whether the right is one perfected by the death of the husband, or one merely inchoate, is such an incumbrance upon the title as renders it is defective and justly obnoxious to the objections of the grantee.—Parks v. Brook, 16 Ala. 529; Springle's Heirs & Admr's v. Shields & Paulling, 17 Ala. 296. The obligor of the bond was bound by the terms of his contract to convey a title free from all claims of dower whether of his own wife or of any other person, and the condition of his bond could not be said to be performed whilst this claim for dower set up by Mrs. Pinckard was outstanding. This being the extent and scope of that contract, under the decision in the case of Springle's Heirs & Admr's v. Shields & Paulling, and the authorities there cited, the complainants would be entitled to compensation for this dower claim, and to have its value deducted from the

purchase money. This is a clear equitable right, which, of itself, gives the court jurisdiction of the cause, and shows the error of the Chancellor in dismissing the bill for want of equity.

Again; the bill alleges, that, by the changes and improvements that have been made upon the place since it passed into the hands of the complainants, its value has been so much enhanced, that an allotment of dower by metes and bounds under the statute, by the Orphans' Court, would be inequitable and unjust. Taking this allegation to be true, we here see also, under the decisions of this court, another distinct ground of equitable interference by the Chancery Court. The law undoubtedly is, that a demandant who seeks dower in land aliened by the husband during his life-time, is entitled to be endowed as of the value of the lands at the time of the alienation; and if the lands have subsequently, in the hands of the purchasers, greatly increased in value, from the improvements which they have made from time to time, the demandant can claim no benefit from such improvements, but must be confined to the value, as above stated, at the time the lands were sold. The Probate Court, being one of limited jurisdiction, can only allot dower in the mode pointed out by statute, and where the decree has to be moulded so as to meet the justice of the case arising from the peculiar circumstances, a court of chancery alone has power to make the proper decree, nor can the Probate Court allot dower, except in those lands of which the husband died seized.—Nance v. Hooper, 11 Ala. 552; Barney v. Frowner and Wife, 9 Ala. 901. Here is the second ground of equity shown by the bill.

For these reasons, the decision of the Chancellor dismissing the bill for want of equity is reversed, and the cause remanded, with instructions to have the same re-docketed, and that the court below proceed with the cause. It is further ordered that the defendants in error pay the costs of this court.

HUTCHISON *vs.* CULLUM.

1. When a written contract for the building of a house is subsequently varied by the parties, so as to require a greater amount of work and materials, as well as an alteration in the structure and a longer time for its completion, the workman is not bound to sue on the original contract, but may recover on a *quantum meruit*; and the written contract is admissible in evidence to show what the parties had agreed on as reasonable for that portion of the work embraced in it.

ERROR to the City Court of Mobile.

Tried before the Hon. ALEX. McKINSTRY.

ASSUMPSIT by James F. Hutchison, against Charles Cullum, the declaration containing all the common counts. Under the *quantum meruit* count in his declaration, the plaintiff offered evidence to show the amount of work and labor done and materials furnished by him in erecting a certain building for the defendant. The defendant objected to this evidence on the ground that there was a special written contract between the parties, which he produced and proved; but the plaintiff contended that said special contract was annulled after the commencement of the building, and material modifications and alterations made in it; and he adduced evidence to the court to this point. The court decided, that there was a written contract between the parties, and that plaintiff should have declared upon it; and that the evidence offered by plaintiff was not admissible under the *quantum meruit* count of his declaration.

The plaintiff objected to this ruling of the court, and now assigns it for error.

JOHN T. TAYLOR, for plaintiff in error:

1. The evidence adduced by plaintiff was admissible under the *quantum meruit* count, and entitled him to a recovery under that count.—McVoy v. Wheeler, 6 Porter 201; Aikin v. Bloodgood, 12 Ala. 221.

2. The question was one for the decision of the jury, whether the written contract had been annulled or varied by subsequent agreement; and the court erred in deciding it himself, instead of

submitting it to the jury.—Clay's Digest 340 § 149; 10 Ala. 333; 14 *ib.* 460; 16 *ib.* 398; 2 Stewart 355.

DANIEL CHANDLER, *contra :*

1. Where a special agreement remains in force, the plaintiff cannot resort to the general counts.—13 Johns. 96; 18 *ib.* 169; 10 Ala. 330; 20 *ib.* 811; 7 Johns. 133; 13 Johns. 56.

2. If there is a count on a special agreement, and a general count for work and labor done, plaintiff may abandon the special count, and resort to the general count, if he fail to prove the special agreement; but this cannot be done, if the work and labor were performed under the special agreement.—18 Johns. 451.

3. The addition of other work to the contract, without any departure from the contract, does not change the contract itself; but if no price is agreed on for such additional work, a *quantum meruit* would lie for it.—12 Ala. 221. The evidence here shows that the contract was never abandoned; the work was done agreeably to the specifications of the agreement, except as to the additions or modifications; and as to them the plaintiff was allowed to recover for what the work was worth.

4. The furthest that any of the authorities have gone is to allow a recovery on the common counts, although there is a special contract, whenever the plaintiff is entitled, by a breach of the contract, to recover a sum *in numero.*—10 Ala. 332; 20 *ib.* 811; 7 *ib.* 952. In this case there is no pretence that the damages were liquidated.

5. A sealed instrument cannot be discharged by a parol executory contract; but it may be waived or discharged by a new parol contract, when the consideration is executed.—13 Wendell 75; 10 *ib.* 180; 11 *ib.* 27; 7 Cowen 48; 14 Mees. & W. 190. In this case there was no new contract except as to the alterations; the old contract remained in full force.

6. The cases cited by plaintiff's counsel from 6 Porter and 12 Ala., do not sustain his position.

8. The question was properly decided by the court.—18 Ala. 650; 19 Ala. 491.

CHILTON, C. J.—The court below ruled, that there could be no recovery under the *quantum meruit* count, for the work and

labor done and materials furnished by the plaintiff in erecting a house for the defendant, as to that portion of the work &c. for which provision is made in the special contract, notwithstanding the proof showed that the special agreement had been so varied as to considerably enlarge the building, requiring the timbers for a portion of it to be spliced, and increasing the expense of the work and materials to between three and five hundred dollars. In this the judge mistook the law. It is obvious, that if Hutchison, after the modification or change of the agreement, had gone on to complete the job according to the contract as it originally stood, and had sued upon it to recover for the work, he could not have maintained his action; for he would have built a different edifice from that specified in his subsequent undertaking. The fact that such recovery could not properly be had under the agreement, shows that he is not bound to declare specially upon it. A slight or immaterial alteration in the structure of the building, or the addition of extra work not materially varying the terms of the agreement, we are prepared to concede, would leave the original contract as it stood before the supposed change. But where there are such alterations or additions as materially affect the contract as it originally stood, requiring the house-joiner to cast away much of his lumber procured for the completion of the first contract, or to incur a considerable additional expense in splicing the timbers, so as to erect the building according as the parties had stipulated for its enlargement by the modified agreement, it is very clear, we think, that the first agreement is waived by the subsequent one, and if the latter specifies no amount which the workman is to receive, he should be allowed to recover for the work and materials as much as they were reasonably worth.—The special agreement is, however, properly receivable in evidence, as showing what the parties had agreed upon as reasonable for that portion of the work embraced in the first contract. This view, we think, is in harmony with our previous decisions in McVoy v. Wheeler *et al.*, 6 Por. 201, and Aikin v. Bloodgood, 12 Ala. 221.

That the enlargement of the house materially affected the original agreement clearly appears from the proof in the cause. According to the deposition of Mr. Quigly, it required the upper tier of joists should be spliced, and supported by posts.—

These joists were long enough, had the parties proceeded under the first contract. Besides, it required two additional doors, one window leading out of the second story, and three windows in the third story. In fact, the building was to be made wider by an extension eastward to the distance of five feet two inches, requiring, as Mr. Dougherty stated, over three hundred dollars, and according to Mr. Lamb, four or five hundred dollars additional expense to the carpenter. There must have been a corresponding change in the roof and the quantity of covering.

These alterations of the original plan may have required a much longer time for the completion of the building, than was provided in the contract as it at first stood; and assuming this to be true, let us suppose, as a further test of the correctness of our view, that Hutchison had failed to complete the work by the first of October, 1850, and that Cullum had sued him to recover the penalty "fifty dollars for each and every day thereafter the work remained unfinished." Would it admit of any doubt, that Hutchison might well plead the subsequent change of the contranct, making alterations in the building, and requiring a material increase of work and a longer time for its performance so as to complete it? Such plea would be clearly good.

The change of the contract, then, affects not only the quantity of work to be performed, and the amount of materials to be furnished, as well as an alteration in the structure, but also in the time for the completion of the edifice; and thus changed, it is clear the workman was not bound to sue on the contract, but might resort to a *quantum meruit*.

Let the judgment be reversed, and the cause remanded.

WHITSETT, GARNER & CO. *vs.* SLATER.

1. When a sheriff is ruled for failing to make the money on an execution, evidence that the defendant in execution "was in possession of a house and lot, as of his own property, prior to the day on which the execution came to the sheriff's hands, claiming ownership thereof, and continued in possession until after the return day of the execution," is admissible evidence for plaintiff.
2. Evidence of general neighborhood rumor that certain slaves, in the possession of the defendant in execution, were the separate property of his wife, is not admissible evidence for the sheriff, either to show an excuse for not levying plaintiff's execution, or as tending "to show a reasonable excuse for not levying within a reasonable time for making necessary inquiries as to the title of the property."
3. What constitutes due diligence on the part of the sheriff depends materially on the facts of each case, and no general rule of universal application can be laid down by the courts; but where he receives an execution against a resident citizen of his county, who is in open possession of personal property sufficient to satisfy it, and he makes no effort, for thirty days after its reception, to levy or to give plaintiff notice of any real doubts which he may entertain of the liability of the property to the execution, he is guilty of a want of due diligence.
4. A charge is erroneous, which assumes certain facts as proved, without referring to the jury the credibility of the testimony, and allowing them to determine whether those facts are proved or not.
5. What constitutes due diligence on the part of the sheriff, is a mixed question of law and fact; the jury must determine the facts, while the court decides whether they constitute due diligence.

ERROR to the Circuit Court of Washington.

Tried before the Hon. LYMAN GIBBONS.

The plaintiffs in error, having two judgments in the Circuit Court of Washington County against Curtis N. Wilcox, Jacob Boyd and George W. Boyd, caused two writs of *fi. fa.* to be issued thereon on the 24th day of March, 1849, which came to the hands of the defendant in error, as sheriff of Choctaw County, on the 30th day of March, 1849. Said executions were returnable on the 2nd Monday in October, 1849. The sheriff having failed to make the money thereon, the plaintiffs in execution suggested such failure to the court, and that he could have made the money by the exercise of due diligence. Whereupon a rule was granted against said sheriff, requiring

him to show cause why judgment should not be entered against him for the amount of said *fi. fa.*, with the interest, damages and cost prescribed by the statute in such cases.

The defendant appeared in obedience to said rule, when an issue was made up and tried between the parties.

On the trial of this issue, as is disclosed by the bill of exceptions, the plaintiffs proved that the writs of *fi. fa.* in their favor against Wilcox and the Boyds issued, and came to the hands of the defendant as sheriff of Choctaw County, at the times stated in the suggestion; that at that time Jacob Boyd lived on a plantation in Choctaw County, and had in his posssession three slaves, Jack, Bob and Eliza; that the defendant levied on Jack, under plaintiffs' executions, on the 3rd May, 1849; that said Jack was taken from said sheriff under a writ in detinue, at the instance of the representatives of John Boyd, deceased. Plaintiffs further offered evidence tending to show that the girl Eliza continued in the possession of Jacob Boyd, as a house servant, until the middle of June, 1849; that Bob continued in his possession, employed as a field hand, until about the 1st August, 1849; that when these slaves left the possession of said Boyd, they were run off and disposed of by his wife. Plaintiffs also introduced one Petty as a witness, who testified that he went to live at Jacob Boyd's on the 1st June, 1849, having been employed by Mrs. Boyd; that he was specially charged by Boyd and wife to keep the negroes, Bob and Eliza, beyond the reach of any one who might approach, as it was apprehended the sheriff would try to levy upon them; that early in June the sheriff came to the house of Boyd, for the purpose of levying upon said negroes, but witness saw him, or heard of his being there, and told the boy Bob to hide in the gin-house; that witness then went to the house, and found the sheriff and several of the neighbors sitting in the piazza; that witness passed into the house, and went to sleep; when he awoke and came out, he saw the sheriff leaving the place; that soon after the sheriff was gone, the door leading to the second story of the house was unlocked, and the girl Eliza came out; that about two weeks afterwards the sheriff came again to the house of said Boyd; that in the intermediate time Mrs. Boyd had carried off the girl Eliza, and disposed of her; that on this occasion the boy Bob slipped off into the woods before the sheriff got to the house or

could see him; that the sheriff came twice in July to levy on Bob, but the slave was studiously kept out of his way. But there was no proof of any efforts to conceal said slaves before the 1st of June. It was also in proof that the sheriff demanded of the plaintiffs a bond of indemnity, before he would levy on the slaves, Bob and Eliza, in the possession of Boyd; this demand was made about the 1st June, 1849, and the bond was given six or seven days afterwards.

The plaintiffs also introduced one McCarty, who, on cross-examination stated that, in his opinion, neither the sheriff nor any of his deputies could have levied on the slaves, Bob and Eliza, from the time said writs of *fi. fa.* came into his hands, until they were removed from the county. On re-examination he stated, that he was at the house of Jacob Boyd twice or three times only, in company with said sheriff, and that was in the month of June, 1849; that Bob was a constant field hand, and Eliza a house servant, at Jacob Boyd's, during the summer of 1849, until Eliza was taken away about the middle of June, and Bob about the 1st of August of that year; that witness lived near Boyd, and was at his house nearly every day.

The plaintiffs further offered to prove by parol, that one of the defendants in the executions was in possession of a house and lot in said county, as of his own property, prior to the 30th of March, 1849, the day on which the sheriff received said writs of *fi. fa.*, claiming ownership of said house and lot, before said 30th of March, 1849, and continued in possession thereof until the return day of said executions. The plaintiffs proposed to prove these facts for the purpose of showing property in said house and lot in said defendant, and that the same was liable to the execution. This proof the court excluded, holding that the mere possession of real estate, without claim of ownership, was not *prima facie* evidence of such title as is subject to execution; and that evidence of the possession of the house and lot, with claim of title, prior to the coming of the execution to the hands of the sheriff, was inadmissible, unless there was evidence of claim of title or ownership after the coming of the execution to the sheriff's hands; to which ruling of the court the plaintiffs excepted.

The defendant then offered to show as an excuse for not having levied the plaintiffs' executions, that, at the time they came

to his hands, and while he held them, there was a general rumor in the neighborhood of Jacob Boyd, that the slaves Bob and Eliza, which he then had in his possession, belonged to his wife. To this the plaintiffs' counsel objected; but the court admitted the evidence, holding that it was proper, as it tended to show a reasonable excuse for not levying within a time reasonable for making necessary inquiries as to the title of the property; to which ruling of the court the plaintiffs excepted.

The court charged the jury, that, if the sheriff received the executions on the 30th of March, 1849, and they were returnable to the Fall term of the Circuit Court of Washington County, and the sheriff had a reasonable doubt whether certain slaves belonged to one of the defendants in the executions, he would not be chargeable for want of due diligence, by waiting a reasonable time before notifying the plaintiffs in execution of his doubts as to the liability of the property, and demanding a bond of indemnity; and that from the 30th of March, 1849, to the 1st of May of that year, was not an unreasonable time.—To this charge the plaintiffs excepted. The plaintiffs then asked the court to charge the jury, that, after receiving the bond of indemnity, the sheriff did not use due diligence simply by going to the house of one of the defendants in execution, who had slaves in his possession, and, knowing the slaves to be there, not going to the kitchen or negro houses or to the fields for the purpose of finding the slaves. This charge the court refused to give, but stated to the jury, that the question of diligence, under the circumstances, was left to their determination, under the proof. To the refusal of the court to give the charge asked, and to the charge given, leaving the question of due diligence to the determination of the jury, the plaintiffs excepted.

The several matters excepted to are here assigned for error.

C. W. Rapier, for plaintiffs in error:

On suggestion against a sheriff for failing to make the money under an execution, evidence that the property in possession of the defendant in execution was said not to belong to the latter, will not excuse the sheriff from a levy.—Robertson v. Beavers, 3 Por. 385.

Where one has been in possession of land for several years, the inference is that the occupancy is legal, and that he has such

an interest as may be sold under execution.—Doe *ex dem.* Heydenfelt v. Mitchell, 6 Ala. 70.

If the defendant is in possession of property, the presumption of law then is, that he is the owner of it, and that it is liable for his debts; and if a sheriff, under such circumstances, returns the execution "no property," he assumes the burthen of proving that the property in the possession of the defendant, and which he could have levied on, is not liable to the execution.—Governor v. Campbell, 17 Ala. 570.

The Circuit Court, at one stage of the proceedings, ruled that it was not unreasonable for the sheriff to delay making a levy for a specified time; and, at another stage, ruled that the question of due diligence was altogether for the determination of the jury. These positions are inconsistent, and one or the other is erroneous.

John T. Taylor, *contra:*

To enable the plaintiff to recover, it was required of him to prove: (1st,) that the defendant in execution had property (2d,) during the time the execution was in the hands of the sheriff, (3d,) subject to levy and sale under the execution, and (4th) want of diligence; and in fixing the penalty on the sheriff, the plaintiff must be held to a strict performance of these requisites. The mere naked possession of land does not prove or raise even a presumption of a legal title, which is alone subject to levy, and differs widely in this respect from personal property, which was the case in 3 Porter referred to by plaintiffs.

Even possession and claim of title does not come within the rule, for land is owned under writing. If the claim should be made under deed or writing, as if the tenant should say that he claimed under a deed from A B, this, with possession, might be *prima facie.* One may be in possession under good claim, but it may be merely equitable, which is not subject to levy—a pre-emption right, and many other claims that may be cited. But in this case there was no possession and claim during the time the execution was in the sheriff's hands.

In the case in 6 Ala., referred to by plaintiffs, the defendant in execution had been in possession four years, claimed title, and had built houses and other valuable improvements. There was something tangible that did belong to the defendant, the houses

and improvements were at least his. It is an easy matter for the plaintiff to show title in the defendant if he has any; but if you presume title in the defendant in execution, then you make the sheriff take the place of a plaintiff in ejectment, and prove a perfect title in a third person against the world.

As to third and fourth assignments of error, the plaintiffs complained that the sheriff had delayed too long in asking for an indemnity bond, and on this point the evidence of rumor was admitted, and was certainly proper to give the sheriff time to look into the right of Boyd; but even if either of these assignments was error, still no injury was done plaintiff; the delay could not have injured him even if entirely unexcused, because both the negroes were still at Boyd's, in the same position when the bond was given, and until a long time afterwards, and the execution was not returnable until October.

Whether the negroes could have been taken or not, or whether the sheriff should have gone to the kitchen, or to the gin, or to any other particular place, is purely a matter of diligence, which the act itself under which the plaintiffs brought this rule imperatively requires.

LIGON, J.—1. The first exception taken in the court below relates to the ruling of that court in excluding from the jury the evidence offered by the plaintiff, tending to show that one of the defendants in the executions which the sheriff had in his hands "was in possession of a house and lot in Choctaw County, as of his own property, prior to the day on which the executions came into the hands of the defendant in this suit, claiming ownership thereof, and continued in possession until after the return day of the executions." It does not appear that the sheriff used any exertions whatever to make the money on the writs in his hands out of the lands of any of the defendants, or, indeed, that any one of them possessed lands under claim of title, except the one alluded to in the above exception.

When a proceeding is instituted by a plaintiff in execution, against a sheriff for failing to make the money on an execution in his hands, and the former shows that the defendant in execution was in possession of property which, from its nature, is the subject of levy and sale for the satisfaction of his judgment, it is incumbent on the latter, especially if he has returned the ex-

ecution "no property found," without an effort to levy on such property, to show that it is not subject to sale for the satisfaction of the judgment. If the property possessed by the defendant in execution be land, it is not necessary that the plaintiff should show that his debtor is in possession under a deed, in order to establish that it is liable to the payment of his judgment. Many possessory interests in lands are the subject of levy and sale under executions on judgments at law, which are not required to be evidenced by deed duly registered. The written evidence of such interests is generally in the possession of the defendant in execution, and entirely beyond the control or power of his creditor. In such cases, the only evidence which the creditor could adduce on a proceeding like the present would be parol evidence of such possession and claim of ownership in reference to the lands by the execution debtor, as would create a reasonable presumption that he was the owner of such lands. In such cases it has been held, that, if the defendant in execution has been several years in possession of the premises, under a claim of ownership, and has made improvements thereon, it will authorize the presumption that he has such an interest as is the subject of levy and sale under execution on a judgment at law.—Doe *ex dem.* Heydenfeldt v. Mitchell, 6 Ala. 70. The facts relied on in that case to establish the interest of the defendant in execution were all proved by parol, and are of a class which are not ordinarily proved in any other way. The evidence offered in this case is of the same character, and the facts proposed to be established by it tend as strongly to prove a leviable interest in the defendant in execution, as did those proved in the case cited. The circumstance that the claim of title by the defendant in execution, accompanied with possession, was made before the execution came into the hands of the sheriff, can make no material difference, since the plaintiffs offered to show, in connection with that proof, that the defendant, who so possessed the premises and claimed title to them, continued in the uninterrupted possession of them until the return day of the *fi. fa.*, and there is no pretence that he ever disclaimed his ownership. The law will refer the subsequent possession to the prior claim of title, when nothing is shown to rebut such an inference. Although such evidence is not conclusive of title in the defendant in execution, yet it tends to make out, *prima fa-*

cie, such an interest as the sheriff might have levied upon, and was consequently admissible. Under such circumstances, if the sheriff return the *fi. fa.* "no property found," as is the case here, he assumes the burden of proving that the property in the possession of the defendant, which he could have levied upon, is not liable to the execution.—Governor v. Campbell *et al.*, 17 Ala. 570.

2. The third assignment of error is predicated on the action of the Circuit Court in admitting evidence of the general rumors in the neighborhood of Jacob Boyd, that the slaves Bob and Eliza were the separate estate of the wife of Boyd, and consequently not liable to the plaintiff's execution. It is said, in the bill of exceptions, that this evidence was offered "to show an excuse," on the part of the sheriff, "for not having levied the plaintiff's execution," and was admitted by the court, "as it tended to show a reasonable excuse for not levying within a time reasonable for making necessary inquiries, as to the title of the property."

The purpose for which this evidence is said to have been offered is easily understood, and for that purpose it is wholly inadmissible; but we do not clearly understand the purpose for which it is said to have been allowed. General rumor is, at best, but hearsay, and cannot be received to excuse a sheriff for failing to perform a duty imposed upon him by law. If the property held by the defendant in execution does not really belong to him, and the title is in another, this fact, in a proceeding like the present, must be proved, as title is required to be shown in any other action in which it is called in question. If the sheriff had such real doubts of the property being liable to the execution in his hands, as to induce him, under our statute, to require indemnity from the plaintiffs in execution before he would hazard a levy; and if he required such indemnity within a reasonable time after the writ came into his hands, and the plaintiffs failed or delayed in giving it, he could show such demand, failure and delay, and rely upon this as his excuse for not making prompt efforts to charge the property in execution.—Watson on Sheriffs 195; 9 Ala. 30. But he will not be allowed to show, that, from neighborhood rumor, he had reason to doubt the ownership of the property, and leave the jury to infer that his negligence was attributable to this cause. Indeed

his doubts will not justify any delay on his part, unless he has acted upon them, and demanded indemnity, which the plaintiff has refused or delayed to give.—Robertson v. Beavers, 3 Porter 385. A capricious doubt as to the ownership, or one founded on mere rumor, will not excuse him.—Smith v. Leavitt, 10 Ala. 92. It was, therefore, erroneous to allow testimony of neighborhood rumors to go to the jury, when it was objected to by the plaintiffs.

The affirmative charge of the court asserts, that, "if the sheriff received the executions on the 30th of March, 1849, and they were returnable to the Fall term of the Circuit Court of Washington County, and the sheriff had a reasonable doubt whether certain slaves belonged to one of the defendants in execution, he would not be chargeable for want of due diligence, by waiting a reasonable time before notifying the plaintiffs in execution of his doubts as to the liability of the property, and demanding a bond of indemnity; and that from the 30th of March to the first of May was not an unreasonable time." To this charge exception was taken by the plaintiffs.

The question of what constitutes due diligence, is a mixed one of law and fact. It is for the jury to say whether the proof makes out the facts, which the court determines will constitute due diligence. In this respect, the charge under consideration is faultless. What constitutes due diligence, must depend materially upon the facts of each case; no general rule can be laid down by the courts which will be of universal application; but we think it may be safely said, that where a sheriff has received an execution against the property of a resident citizen of his county, who is in open possession of personal estate sufficient to satisfy it, and he makes no effort to levy, and uses no diligence to give the plaintiff notice of any real doubts he may entertain of its liability to his execution, that he may have an opportunity to indemnify him, for thirty days after the reception of the process, he is guilty of a want of due diligence. The court below ruled differently in the charge we are now considering, and in that we are of opinion it erred.

Reasons may often be found which would exempt the sheriff from such an imputation for failing *to make a levy* for that length of time; but it would be difficult to conceive of any which would justify total inaction on his part, or excuse his negli-

gence in seeking indemnity, if he entertained real doubts whether the property was subject to the process in his hands, for the space of a month after he had received it. Certainly the facts presented by this record will not excuse the delay.

4. There was no error in refusing the charge asked by the plaintiff in the court below, in the form in which that charge is set out in the bill of exceptions, for the reason that it makes the court affirm that certain facts have been proved, without referring it to the jury to pass upon the credibility of the testimony, and to say whether those facts were proved or not. It assumes a state of facts as proved, and on this predicates a conclusion of law, which the court is asked to give in charge to the jury. Such charges are never allowable in any case.—Bradford v. Mayberry, 12 Ala. 520; Ivers v. Phifer, 11 *ib.* 535.

But there is error in the directions given to the jury by the court, in connection with its refusal to give the charge requested by the plaintiffs. Those directions assert, as a legal proposition, that the jury have the right, on questions of due diligence, not only to pass upon the facts, but also to say whether they show the diligence required by law. The former part of this proposition is clearly correct, while the latter is clearly erroneous, for the court alone can say whether the facts found by the jury to be proved, make out a case of due diligence on the part of the sheriff.—Stanly v. Bank of Mobile, at the present term.

For the errors pointed out, the judgment must be reversed, and the cause remanded.

HARVEY *vs.* DOE EX DEM. CARLISLE ET AL.

1. A deed of lands held adversely to the grantor is good as between the parties on the principle of estoppel, which can only operate on the parties and their privies; but the grantor may nevertheless maintain ejectment against the adverse holder.
2. The deed of husband and wife, acknowledged by them before a justice of the peace, is a full compliance with the law, so far as the husband is concerned, and may be admitted to record, without any proof of execution by a subscribing witness.

ERROR to the Circuit Court of Russell.

Tried before the Hon. JOHN GILL SHORTER.

EJECTMENT, the declaration laying separate demises from Matilda Harvey and Robert Carlisle. On the trial below, the plaintiff offered in evidence a deed to the premises sued for, made by Wiley Harvey and wife to Matilda Harvey, on the 7th January, 1847, witnessed by two subscribing witnesses, and acknowledged as follows:

"THE STATE OF ALABAMA, } I, John B. Tate, an acting
Russell County. } justice of the peace for said county, do hereby certify that the above mentioned Wiley Harvey, and Nancy Harvey, his wife, personally appeared before me, and acknowledged that they signed, sealed and delivered the foregoing deed, to the above mentioned Matilda Harvey, on the day and year therein written. Given under my hand and seal this 11th day of January, 1847.

(Signed) JOHN B. TATE, (J. P.)"

On which deed was the following endorsement:

"THE STATE OF ALABAMA, } Received for record 7th of
Russell County. } January, 1850, and recorded in the Clerk's Office of the County Court of said county, in Book G, folio 494 and 495, this 15th April, 1850.

SIMEON NEAL, Clerk."

This deed the defendant moved the court to exclude, and the motion was overruled. The plaintiff then offered another deed to the premises sued for, made to Robert Carlisle, executed by the said Matilda Harvey on the 6th March, 1850, with a subscribing witness thereto, with an acknowledgment endorsed thereon purporting to have been made on the 6th of March, 1852, before the clerk of the Circuit Court of Montgomery County; which deed the defendant also moved to exclude, and the motion was overruled. The defendant admitted the lease, entry and ouster, and the plaintiff proved the possession and the value of the mesne profits.

The defendant proved that he had been in possession of the premises for ten years before the commencement of the suit, and that in the year 1847 Matilda Harvey, to whom the original deed was made by the defendant and wife, and who made the deed to Carlisle, executed on the 17th November, 1847, her

bond for titles to the premises, and that defendant at the execution of said bond paid her a valuable consideration; that Carlisle had notice thereof in 1849, about three years before the execution of the deed by Matilda Harvey to him. There was no evidence that Carlisle paid to Matilda Harvey any consideration for the deed executed by her.

This being all the evidence, the court charged, that, if the jury believed the testimony, they must find for the plaintiff. The rulings of the court upon the evidence, and the charge given, are here assigned for error.

S. F. Rice, for plaintiff in error:

1. As the evidence tended to show that the possession of Wiley Harvey was adverse, at the execution of the deed to Carlisle, that deed could not authorize Carlisle to recover from the said Harvey, but was void as to him.—Pryor *et al.* v. Butler, 9 Ala. 418; Hinton v. Nelms, 13 Ala. And therefore there could be no recovery on the demise from Carlisle.

2. But although said deed to Carlisle was void as to Wiley Harvey, it is good as against the parties to it.—Den v. Geiger, 4 Halstead's R. 225, 235, and the authorities there cited on page 235. Therefore, there could be no recovery on the demise from Matilda Harvey. There can be no doubt but that said deed is good as between the parties to it. Suppose the grantor, in fact, had no title to the land thereby conveyed, and should be sued for breach of the covenants and warranty therein contained, by Carlisle, the grantee. In such suit, if he proved want of title in her, and that he never had and could not get the possession, he certainly could recover damages from her.—This proves the deed valid as between the parties to it. The case of Williams v. Hogan, Meigs' R. 187, (cited by Judge Collier in Abercrombie v. Baldwin, 15 Ala.,) is founded entirely on a statute of Tennessee, but the case cited above from 4 Halstead is founded on the common law.

3. The deed being valid as between the parties to it, prevents a recovery on the demise from Matilda Harvey, the grantor; for it estops both grantor and grantee from saying that the title is in her.—4 Halstead's R. 235, *supra.*

4. This suit is really the suit of Carlisle. He is attempting by it to gain the mastery over the law, and to annul in this case

the sound rule of policy which protects possessors against litigious men, by declaring all such deeds as he received from Matilda Harvey void as to all such possessors as Wiley Harvey. Carlisle cannot be permitted to accomplish in this suit indirectly what he cannot do directly. Hinton v. Nelms, 13 Ala. Rep., shows the reasons for the rule as to adverse possession.

5. The charge of the court is erroneous.

6. Each deed read in evidence by defendant in error, was improperly admitted—there being no proof of their execution by a subscribing witness, and no excuse shown for such omission of proof.

Geo. D. Hooper, *contra*.

GOLDTHWAITE, J.—The main question in this case arises on the deed from Matilda Harvey to Carlisle. It is conceded by the plaintiff in error, that it is void as to Wiley Harvey, by reason of his being in adverse possession of the land described in it, at the time of its execution, and this would defeat a recovery on the demise from Carlisle. If this deed is void as to the party holding adversely, it would seem to follow that the plaintiff below would have been entitled to a recovery on the deed from Wiley Harvey to Matilda Harvey, under the demise in the declaration from her. To meet this view the counsel for the plaintiff in error insists, that the deed to Carlisle, although void as to the adverse holder, is good as between the parties, and has therefore operated to convey the title out of Matilda Harvey, and for that reason a recovery cannot be had on the demise from her. This position cannot be sustained.—A deed of lands held adversely to the grantor, it is true, is good as between the parties; but this is upon the principle of estoppel, (4 Kent's Com. 448,) which can only operate upon the parties and their privies. It does not apply to the adverse holder, and as to him it is well settled that the grantor may maintain ejectment.—Williams v. Jackson, 5 Johns. 489; Livingston v. Provers, 2 Hill (N. Y.) R. 489; Wolcott v. Knight, 6 Mass. 418; Brinly v. Whiting, 5 Pick. 348; Edwards v. Rogs, 18 Verm. 473; University of Vermont v. Joslin, 21 Verm. 52; 4 Kent's Com. 448. The decision of this question is conclusive upon the right of the plaintiff to recover on the demise from Matilda Harvey.

The deed from Wiley Harvey and wife was properly admitted in evidence. It was, so far as the husband was concerned, in full compliance with the law.—Clay's Dig. 152 § 7; *ib.* 157 § 39; *ib.* 151 § 1. As to the other deed, it is unnecessary to consider the question raised, as it may be excluded, and still the plaintiff would be entitled to recover.

There is no error in the record, and the judgment is affirmed.

HOOPER'S EXECUTOR *vs.* SMITH AND WIFE.

1. Under the act of 1848, securing to married women their separate estates, a *feme covert* may charge, sell or dispose of her property without the consent or concurrence of her husband.

ERROR to the Court of Probate of Dallas.

THE plaintiff in error, as executor of John Hooper, deceased, was cited to make a final settlement of said estate. The decree of the Court of Probate was reversed on error in favor of Smith and wife, and the cause was remanded.—See 20 Ala. 245.

After the cause was remanded, the executor offered in evidence a written assignment or power of attorney, executed by Mrs. Smith, by which she transferred all her interest in said estate to James McDearman and others, and also a receipt from her to McDearman, acknowledging that he had satisfactorily accounted to her for her distributive share of said estate. But the court nevertheless rendered a decree against the executor, in favor of Smith and wife, for the distributive share of the wife, and this decree is now assigned for error.

N. HARRIS, for plaintiffs in error, contended:

1. That the settlement should have been made, and the rights of the parties determined, according to the act of 1848, as the will was admitted to probate after the passage of that act and before the passage of the act of 1850.—Kidd v. Montague, 19 Ala. 623.

2. That a *feme covert*, as to her separate estate, is regarded

as a *feme sole*, and has the same power of disposition that she would have if sole.—2 Bright on Husband and Wife 220 § 1, 223 § 8, 225 § § 17, 21; Clancy on H. and W. 347; Bradford and Wife v. Greenway, Henry & Smith, 17 Ala. 804. Therefore Mrs. Smith's deed of September 14, 1848, conveyed all her interest in the estate to her assignee.

3. That the receipt of Mrs. Smith for the money was a valid payment on the part of the executor, and discharged him from all further liability.—2 Williams on Executors 1217; 1 Roper on Legacies 887; 2 Lomax on Executors 145.

I. B. Stone, *contra*, insisted:

1. That a *feme covert* can exercise no powers in relation to her separate estate, except those conferred on her by the instrument which creates such separate estate.—14 Smedes & Mar. 56; 4 Barr 93; 7 Sm. & M. 68; 14 Ala. 121.

2. That the separate estate of Mrs. Smith was created by the act of 1850; that under this act the legal title in the property vested in the husband as trustee, and therefore a payment to the wife will not discharge the executor.—2 Williams on Executors 871; 1 Roper on Legacies 595; Toller on Executors 320, and authorities there cited.

PHELAN, J.—When this case was last here, (20 Ala. 245,) it was sent back in order that Smith, the husband of one of the legatees under the will of John Hooper, should be made a party to the settlement of his estate in the Probate Court.

Upon the last hearing before the Probate Court of Dallas, there was no contest between the executor and the other legatees. The matter was narrowed down to a contest between Smith and wife (for the use of Mrs. Smith) against the executor, respecting the legacy or share of Mrs. Smith under the will of her brother, the testator.

By way of defence in this contest with Smith and wife, (use of the wife,) the executor made proof that he had previously paid to an assignee or agent of Mrs. Smith the full amount of her share or legacy, and received from said assignee or agent a final receipt and discharge. The fact was not disputed. The only thing to be considered was, the law arising upon this state of facts. The Probate Court decided, that it was no defence,

and gave judgment against the executor in favor of Smith and wife (use of the wife) for the whole amount of the wife's legacy; and this decision is assigned for error. The judgment as entered is not expressed to be for the use of the wife, but that is an error which would be amended here, as being clerical in its character. The amendment will be considered as made.

John Hooper's will was admitted to probate 10th July, 1848, at which time the act of 1st March, 1848, of this State, "to secure to married women their separate estates," (Acts of 1848, p. 79,) was in force, and is the law that must govern and regulate the rights of Mrs. Smith in reference to the property or legacy which she acquired under that will. The act of 1850, on the same subject, though retroactive in some of its provisions, and expressly designed to be so, does not affect the rights of the wife as fixed by the previous act, so far as the question we are now considering is concerned.

The act of 1848 simply declares, that all the property of every kind held by a woman at the time of her marriage, or subsequently acquired by her in any manner, should "be taken, held and esteemed in law as the separate estate of such woman, and for her sole and separate use, notwithstanding her coverture;" and the husband is expressly excluded from all interest in the same, except such as the act itself confers; which is the right to one half absolutely of her personal property, if she dies intestate, and one half for life of her realty.

The second section of this act declares, that "said property (the wife's) shall be taken, esteemed and held as trust property, and subject to and governed by all the rules of law governing trust estates."

The act is silent upon the subject, but the courts have decided, that the husband is to be considered a trustee in respect to his wife's property under this act.—Key v. Vaughan, 15 Ala. 497.

The rights of a married woman under the act of 1848 may then be considered, so far as respects her power over her separate estate, very similar if not precisely like those of a married woman to whom a separate estate is given by deed or will, without any limitation as to the manner in which she may dispose of it, and in which no trustee is named. What is the law of such a case? We have seen that the law makes her husband a trustee as to this

property. But what next are her rights over it? Can she create a charge upon it, sell or dispose of it at her own pleasure, without the consent or concurrence of her trustee?

We think the authorities are clear, that a woman having a separate estate distinguished by such features, may charge it, or sell or dispose of it at pleasure, and without the consent or concurrence of her trustee, during life, and may make a will of it, if personal property, at her death; and that a court of law to some extent, and a court of equity to the fullest extent, will give validity to her acts. The doctrine is, that in respect to her separate estate, a married woman is to be considered a *feme sole*. And where the deed, will or other instrument creating the separate estate (for instance our statute) imposes no restrictions or conditions on the power of alienation or absolute disposition, the law will impose none, except such as it imposes upon a *feme sole*.

I will here transcribe what Mr. Clancy says upon this subject. He winds up a critical examination of the cases with the following paragraph, which may be considered as presenting in few words the law governing this interesting and important question in the English courts:

"It, therefore, may be now considered as the settled law of our courts of equity, that whenever property has been given to the separate use of a married woman, the gift being unaccompanied by any power of appointment, she is so far to be treated as a *feme sole* in respect to it, that she may (as in cases where she has a power of appointment) dispose of it by will, or by grant of an annuity out of it, and that she may sell her reversionary interest in it; and these cases also prove, that a *feme covert* having separate property, with or without an express power of appointment, may exercise her right of ownership over it, without the consent of her trustees, and even in opposition to them, (unless the terms of the gift require their concurrence,) however improvident the transaction may be, provided it does not appear that she was coerced on the occasion, or that any fraud had been practiced upon her."—Clancy on Husband and Wife 321, and authorities there cited.

The same doctrine, the substance of which is, that a married woman having a separate estate derives her power of alienation, the *jus disponendi*, from the law itself, and not from the

deed creating such separate estate, and that therefore the power exists where it is not expressly restricted or taken away, has been followed in this country by the courts in New York, and opposed by those of South Carolina and some of the other States.—See Jaques v. M. E. Church, 17 John., where the question is carefully considered, and the cases cited; see also, Fireman's Ins. Co. v. Bay, 4 Barb. Sup. Ct. p. 407, to the same effect; also, 20 Conn. 147, Imlay v. Huntington. In the case of Bradford and Wife v. Greenway *et al.*, 17 Ala. 797, this court has already shown a leaning the same way. The question being now submitted for decision, we shall hold the rule adopted by the English and New York cases, which gives to the wife having a separate estate the *jus disponendi*, unless the same is taken away or restricted by the deed or other instrument creating the separate estate.

The decision of this point is decisive of the case, and shows that the Probate Court should have allowed the executor to set up as a defence against the claim of Smith and wife, (for the use of the wife,) the deed of Mrs. Smith of 14th September, 1848, by which, in consideration of natural love and affection for her children by her first marriage, she assigned to them her interest in her brother's estate, and by which she made McDearman, one of the assignees, and her son, J. D. Motley, or either of them, her agent and attorney in fact, to sue for, recover, collect and receipt for the said interest or legacy. This deed was admitted. The proof further showed that, previous to the last settlement, the said McDearman have received from the executor, and executed his receipt for the same, the full share to which Mrs. Smith was entitled. The fairness of the transaction was not impeached. Indeed, it seems that Mrs. Smith was fully satisfied with the course pursued by McDearman, and had received from him a portion of the money, to which, by the terms of the deed of assignment, she would not have been entitled.

This proceeding in the Probate Court by Smith and wife (for the use of the wife) for her legacy, cannot be distinguished in principle from a suit by the same parties in the Circuit Court for the same purpose. There cannot be any doubt as to the right of the executor, in such a suit for the legacy, to interpose as a defence a payment to the *cestui que trust* or her agent, and a receipt in full for the amount. The right of the *cestui que*

trust to assign or dispose of her interest being established, the right to give a release or discharge necessarily follows. Then, whether the demand be prosecuted at law or in equity, if prosecuted for the use of the *cestui que trust*, her receipt or that of her agent or assignee can be interposed in bar of the action. It is no more in principle, than if Smith and wife (use of the wife) had brought suit on a note made to the wife before the marriage, and after the act of 1848, and a receipt for payment in full from Mrs. Smith had been offered in defence.

The judgment of the court below must be reversed; and as all the facts appear of record which are important to a final disposition of the case, a decree must be here rendered in favor of the executor, as having fully paid and discharged the legacy or share of Mrs. Smith.

HARRIS *vs.* ROWLANDS' ADM'RS.

1. A vendee is entitled to recover damages of his vendor for a breach of an express warranty of title to a slave, upon proving the recovery of a judgment against his vendee by one having an adverse title, and of another judgment by his vendee against himself, and that defendant was notified of the pendency of both suits.
2. When the bill of exceptions does not show whether a notice was written or verbal, the Appellate Court, construing the bill most strongly against the plaintiff in error, will presume, if necessary, that it was written.
3. An offer to rescind by the vendor, not accepted by the vendee, has no legal effect whatever on the contract, unless the offer is based on the fraud or bad faith of the vendee.
4. Where a vendee, on being informed that an adverse title was set up to the property, examines that title, and expresses himself satisfied with his own, this does not deprive him of his right of action against his vendor on a breach of his warranty of title.

ERROR to the Circuit Court of Benton.

Tried before the Hon. THOMAS A. WALKER.

THIS was an action of ASSUMPSIT by the defendants in error, as the personal representatives of one Richard D. Rowland,

against the plaintiff in error, to recover a certain sum of money alleged to be due and owing the estate of the said Rowland, by reason of a breach of warranty on a contract of sale of certain negroes made by the said plaintiff in error, to the said Rowland in his life-time. There was a verdict and judgment for the plaintiffs in the court below, and the defendant brings the case to this court.

On the trial below a bill of exceptions was allowed, from which it appears that the plaintiffs below, in order to sustain their case, offered in evidence a bill of sale, of which the following is a copy, to-wit:

"Received of R. D. Rowland five hundred and fifty dollars, in full for negro woman Rhoda, aged about nineteen years, and her boy child, Columbus, aged about two years, also her girl child, aged about five months; all of said slaves I warrant sound, titles good, and slaves for life, this 31st January, 1846.

(Signed) MARY HARRIS,
per JAMES CROW."

The plaintiffs also introduced two records, showing that one Rutledge had recovered the property mentioned in the bill of sale from C. L. Shelton, the vendee of Rowland with warranty of title; that said C. L. Shelton had recovered the same from R. D. Rowland, plaintiffs' intestate; that said judgments had been satisfied, and that defendant had notice of the pendency of both suits.

Defendant introduced a witness, who proved that, as the agent of defendant, he called on said R. D. Rowland, before the negroes mentioned in the bill of sale were delivered to said Rowland, and proposed to him a rescission of the sale, on the ground that Rowland had not paid enough for the negroes; which Rowland refused. The witness also proved that afterwards, in June following, but as witness thought, after Rowland had sold the negroes to Shelton, he, as the agent of defendant, again called on Rowland, and informed him that Rutledge was about to commence suit for the negroes, and again proposed to Rowland to rescind the sale; which Rowland also refused. It was also proved that, before Rowland sold said negroes, and while he had them in possession, four or five days after the sale, he was informed by a witness, not the agent of defendant, of the claim that Rutledge was setting up to said negroes; that he, Rowland,

made an examination of the records of the Circuit and Orphans' Court of Benton County in reference to Rutledge's title, and after said examination expressed himself satisfied that Rutledge had no title to the negroes, and afterwards carried them off and sold them to Shelton. This was all the evidence in the case; and there being no conflict in the proof, the court charged the jury that, if they believed the evidence, they must find for the plaintiffs; to which charge the defendant excepted, and here assigns the same for error.

S. F. Rice, for plaintiff in error:

1. The vendee of a chattel, who has conveyed all his interest therein with warranty, cannot maintain an action against his vendor for a breach of the warranty subsequently occurring, until he is compelled to pay damages on his own warranty, or obtains a release of the same from his vendee. "He is liable on his warranty, it is true, but before he has suffered, he cannot sue for indemnity." "He cannot sue until he is first damnified.—Wheeler v. Sohier, 3 Cushing's R. 219.

All the evidence adduced on the trial is set forth, but does not show that Rowland or his administrators were sued or paid anything before this suit was commenced. A suit commenced, or payment made after this suit was commenced, would not enable them to sustain this action. The charge of the court was therefore erroneous, because it entitled the plaintiffs below to a verdict, although the suit against Rowland, and the payment of the judgment against Rowland, occurred after this suit was commenced.

2. Mere "notice of the pendency" of a suit against a vendee, will not make the recovery in that suit against the vendee evidence in a subsequent suit by the vendee against the vendor, to prove either a want of title or damages. It is certainly not evidence to prove both want of title and damages. Before the recovery in such suit can be regarded as evidence on both these points, it must appear that during its pendency the vendee vouched the vendor; called on him to defend him in that suit, or to defend the title.

A vendor might have notice of the pendency of a suit between A and B, and might not know the subject matter of the suit. He might have notice of the pendency of a suit against his ven-

dee, without knowing that his vendee was sued for the property sold him, or that he was looked to or relied on by his vendee to defend the title. He cannot be put in default by merely showing that he had "notice of the pendency" of a suit against the man to whom he had sold a chattel.

If a vendee wishes to make a recovery against him evidence to prove want of title and damages in a subsequent suit by him against his vendor, he must call upon, or notify, or vouch his vendor in writing during the pendency of the first suit, to defend that suit, and inform him that the title to the property bought by him and warranted to him is drawn in question. This is fair as well as lawful. A mere notice of the pendency of a suit is too general and indefinite to amount to any thing, especially when it does not appear how the vendor got such notice, or who gave it. The vendee ought to give notice.—Hampton v. Shehan, 8 Ala. 942; Lewis v. Peake, 7 Taunt. 153; Salle v. Light, 4 Ala. A verbal notice is insufficient.—Hunt v. Langstroth, 4 Hals. R. 223.

3. The evidence did not warrant the charge given, and the judgment ought to be reversed; for such a charge ought never to be sustained, unless the evidence clearly shows the right to recover.

MORGAN & WALKER, *contra:*

1. The contract was complete when the bill of sale was executed, at all events, and an offer to rescind should have been made before that time. But there was no pretence for the offer to rescind, except that the price was too small which Rowland was to give for the negroes.—Freeman v. Baldwin, 13 Ala. 246; Gillespie v. Battle, 15 Ala. 276.

2. The notice to plaintiff in error of the pendency of the suits, was sufficient to make the records evidence against her.—1 Johns. 517; 6 Johns. 158; 5 Wend. 535; 13 Johns. 224.

GIBBONS, J.—The sole question presented by the bill of exceptions is, whether or not the charge of the court below to the jury was correct.

The case presented by the bill of exceptions, is that of a vendee suing his vendor for breach of warranty of title on a sale of negro property made by the latter to the former, with express

warranty of title. The proof shows that a recovery had been had against the plaintiffs' intestate, by one Shelton, on a warranty of title to the same property to him, and also that one Rutledge had recovered the property from the said Shelton on an adverse title; that the said judgments had been satisfied, and that the defendant was notified of the pendency of both suits. On the case thus stated, the law is in our opinion with the plaintiffs.

It is insisted, however, that the notice to the plaintiff in error was not sufficient in order to render the records of the recoveries had against Shelton and the plaintiffs' intestate evidence in this cause; and that a mere verbal notice is not sufficient in any case. The answer to this objection is two-fold: first, the records were offered in evidence, and received in the court below without objection; and, second, it does not appear whether the notice to the plaintiff in error was by parol or in writing. On the principle that a bill of exceptions is to be taken most strongly against the party excepting, we would intend, if it were necessary, in the present state of the bill of exceptions, that the notice was in writing. The only mode in which that presumption could be rebutted would be, by stating specifically in the bill of exceptions the kind of notice that was proved to have been given to the plaintiff in error. As to the question whether or not in such a case a parol notice would be sufficient, we decide nothing in the present case, as in our opinion that question is not legitimately presented.

Nor does the proof offered by the defendant, as shown in the bill of exceptions, alter the legal aspect of the case made by the plaintiffs in the court below. A mere offer to rescind a contract by one party, not accepted by the other, has no legal effect whatever upon the contract, unless the party making such offer bases the same upon the fraud or bad faith of the other party. In such cases, the law considers an offer to rescind as equivalent to a rescission. But when the offer is not based upon the fraud of the other party, or upon some breach of contract or duty on his part, the mere offer to rescind refused by the other party has no effect whatever upon the contract.—Walker v. Clay & Clay, 21 Ala. 797. This would apply as well to the offer made before the slaves were delivered, as to that made after such delivery; but the offer made before such delivery, if there was any

virtue in it, would be waived by the subsequent delivery of the property and execution of the written contract.

Nor does the fact that the plaintiffs' intestate, Rowland, on being advised that Rutledge set up title to the property, examined that title, and expressed himself satisfied with his own title, make any difference as to his right of action against the defendant below. This right of action arose upon the warranty of the defendant, and nothing but a distinct waiver on the part of Rowland could deprive him of it on a breach of that warranty so made by the defendant. This the testimony does not pretend to prove.

We find no error in the record, and the judgment is affirmed.

PINCKARD AND POOL *vs.* PINCKARD'S HEIRS AND ADMINISTRATORS.

1. Equity will not enforce the specific execution of a parol gift of land by a father to his son, though accompanied by delivery of possession, either against the father himself, or his heirs at law and personal representatives after his death.

ERROR to the Chancery Court of Chambers.

Heard before the Hon. JAMES B. CLARK.

J. FALKNER, for plaintiffs in error.

J. W. GWINN and S. F. RICE, *contra*.

CHILTON, C. J.—This bill was filed by the plaintiffs in error to enforce the specific execution of a parol gift, alleged to have been made of a certain tract of land situate in the County of Randolph, by Peyton Pinckard to William T., one of the complainants, and by the latter sold to Pool. The said Peyton having died before perfecting the gift by any conveyance, his administrators and heirs are made parties defendants to the bill; and the widow of said Peyton having instituted proceedings for the recovery of dower in said land, these proceedings are enjoined, upon the allegations that the complainants have made valua-

ble improvements on the land, and that an assignment by metes and bounds would work irreparable injury to them; and the prayer is, that if she is entitled to dower, it may be assigned in money instead of land.

The bill charges that the father, Peyton, before his death, gave the land, with certain other personal property, to the complainant William T., and placed him in possession of the same as an advancement; that he gave him no written evidence of the gift; that he was placed in possession of the property at the time of the gift, viz., in August, 1840, and has continued to occupy and improve the same ever since, either by himself or said Pool, his vendee; that after the sale to Pool, his father promised the said Pool that he would convey the title to him; that the land was worth when given say $200, but has since been increased in value to $400; that the condition of the father's estate was such as to justify said advancement, and his previous donations to other children were about equal to that made to the said William T.; that the complainant had brought the value of the property into hotch-pot in the distribution of the estate, as far as the distribution had been made, and proposed by the bill to have the value thereof charged to him in the final distribution.

The view which we feel constrained to take of this case will, however, dispense with a more extended statement of the facts.

We consider the cases of Forward v. Armstead, 12 Ala. R. 124, and Evans v. Battle *et al.*, 19 *ib.* 398, decisive of this in principle. True, in the first named case, the judge, in discussing the principle upon which a claim for improvements may rest when the court refuses specifically to execute a contract, says: "This principle, we apprehend, can have no application to a mere donee, unless he has been induced to make the improvements under the promise of a conveyance; (whether even then it would apply, is a matter as to which we express no opinion;) for, until then, it cannot be said that a fraud is practiced on him; and it was his own folly to improve lands which he knew in point of law to belong to another," &c.

The principle, however, above discussed, has nothing to do with the question as to whether the court of equity can, in the exercise of a proper jurisdiction, grant the relief prayed for by this bill.

The alleged promise to give or to convey, is by parol, or verbal merely ; is without any consideration whatever ; and we are asked to take the case, not only out of the statute of frauds and perjuries, but to relieve against that other principle, that a court of equity will not become active in affording relief, at the suit of a volunteer, for the specific execution of an executory gratuitous promise, against the donor or those claiming under him.

We are not called upon now to decide whether this is a proper case to award pay for the improvements. The bill was not framed with that view; nor when dismissed on the merits, was there any effort to re-instate it upon the ground that the complainants could make proper allegations, showing that they, or one of them, were entitled to more than the rents and profits would amount to as compensation for improvements. We, therefore, leave that matter, as the Chancellor very properly did, to be adjusted by another suit, if the parties choose further to litigate it.

The complainants failing on the merits, and not being entitled to a decree for the land, show no ground for controverting with the widow her claim to dower. But, if they had such interest, it is clear they present no reason why the Orphans' Court might not proceed to allot it by metes and bounds. The husband died seized, and it does not appear but that the land is capable of division so as to give the widow a life estate in one third thereof, acccording to quantity and quality, as provided by the statute, without injustice to any one.

The case of Stone v. Britton, 22 Ala. 543, is very unlike this in an essential particular. In that case, a *valuable consideration* was paid for the land to the equitable owner, or to his creditor at his request, for he directed the sheriff to levy, and induced the purchaser to buy. In effect, he made the sheriff his agent to sell the land; and having reaped the benefit of the proceeds of the sale, it would have amounted to a gross fraud to permit him to disaffirm the transaction, and avoid the sale which he had superinduced and had afterwards sanctioned. In the case at bar, there is no contract, no consideration, no false representation. The father, had he lived, would most probably have perfected the gift; but having died without doing so, the court will leave the party where it found him. The doctrine, though at one time much questioned, is now well settled, that the court will not lend its assistance to compel the completion of

an agreement or stipulation which is voluntary on the part of a father, as against the father, to grant or convey in favor of a child.—2 Spence's Eq. Jurisp. 888 to 895, and cases cited.

It is further very clear, that if the incomplete contract or gift could not be rendered perfect as against the donor, it cannot against his personal representatives and heirs at law; for they stand in the place of the donor.—*Per* V. C. Wigram in McFadden v. Jenkyns, 1 Hare's R. 460; *Per* Ld. Chan. Hart, Uniacke v. Giles, 2 Molloy 269; 2 Spence's Equity Jurisp. 890, note b.

Let the decree of the Chancellor be affirmed, with costs.

STANLEY *vs.* BANK OF MOBILE.

1. Appearance and pleading to issue amounts to a waiver of all exceptions to previous irregularities.
2. In summary proceedings by notice and motion against Bank debtors, the notice serves the double purpose of a writ and declaration, and prevents the statute of limitations from creating a bar, although the motion for judgment is afterwards delayed.
3. In an action against an endorser, parol evidence being adduced, in support of the certificate of notice annexed to the protest, that he kept no clerk, and that the notice was left at his office on the day of protest, the whole evidence should be referred to the jury, to decide whether he had actually received the notice.
4. A charge is erroneous which refers it to the jury "to decide as to the sufficiency of the notice" to charge an endorser; it is the province of the jury to ascertain the facts, while the court determines their legal sufficiency to constitute notice.
5. When a notice of protest is left at the office of an endorser, who is an attorney and keeps no clerk, on the evening of the day on which it is required to be given, the law presumes that he received it, and it is sufficient to charge him.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. LYMAN GIBBONS.

THIS action was commenced by notice of motion for judgment on a certain promissory note made by John A. Cuthbert,

and endorsed by the plaintiff in error. The note is payable on the 1st day of July, 1845. The notice of motion for judgment is dated, and executed on defendant, on the 21st June, 1851.

On the return day of the notice, the court made an order that all motions in favor of the Bank of Mobile to be made on that day, and on which the notices were made returnable on that day, be continued until the next succeeding Monday of the term. On the Saturday preceding the Monday to which the motions in favor of the Bank had been continued, the court adjourned over until the next succeeding Tuesday, on which day a judgment by default was regularly entered against the defendant. On a subsequent day of the term the record contains the following minute entry: "It is ordered by the court, on motion of the defendant, that the judgment rendered against him at a prior day of this term of the court be set aside, and that the cause be placed on the trial docket, to stand for trial at this term of the court." At the same term the defendant pleaded *non assumpsit* and the statute of limitations. The case was continued generally until the Fall term, 1852, when being reached in its order on the docket, the defendant moved to quash the proceedings: 1st. Because the motion for judgment had not been made on the day named in the notice; 2nd. That no action was taken on the notice on the day to which it was first continued; 3rd. The motion for judgment is now made on a day of which the defendant has not had legal notice. This motion was overruled, and verdict and judgment for the plaintiff were rendered on the issues made on the pleas. The defendant excepted to the overruling of his motion.

On the trial, as appears by the bill of exceptions, the plaintiff exhibited the note mentioned in his notice, and offered a protest of a notary public, in which he certified, among other things, that he left a notice to the defendant as endorser at his office. He also called the notary, who testified that he had no recollection of the protest or notice, but from his knowledge of his habits of business he was sure that he left the notice, at the office of the defendant, in the afternoon and before night. The plaintiff proved by another witness, that the defendant was a practicing attorney, and did not keep a clerk. This was the whole testimony in relation to notice of protest.

The defendant requested the court to charge the jury, that the certificate of notice, in the protest of the notary, was not sufficient to charge the defendant; which charge the court gave, but added, that the jury might connect with it the other evidence on the part of the plaintiff, and that if they believed from the evidence, that the notice was left in such a way that in all probability it reached the defendant, it was sufficient to charge him.

The defendant requested the court to charge the jury, that in all the evidence there was not sufficient to charge the defendant; which charge the court refused to give, but left it to the jury to decide as to the sufficiency of the notice. To which charge and refusals to charge the defendant excepts.

The court also charged, that the issue of the notice was the commencement of the suit; and that, as six years had not elapsed from the accrual of the plaintiff's cause of action to the time of such issue, the action was not barred by the statute of limitations; to which the defendant also excepted.

The refusal to quash the notice, and to dismiss the proceedings, the continuing of the case, and requiring the defendant to plead after the judgment by default was set aside, the refusal of the charges asked, and the charges given, are here assigned for error.

Jno. T. Taylor, for plaintiff in error:

When the facts are ascertained, it becomes a question for the court to determine whether the notice is sufficient. The only material evidence in this case is, the recital in the protest "that notice was left at the office of endorser same day." The notary remembered nothing about it; and the fact that defendant was a lawyer and kept no clerk, is entirely immaterial. The recital in the protest is not, of itself, sufficient to charge the endorser.—Rives v. Parmley, 18 Ala. 256; Coster, Robinson & Co. v. Thomason, 19 Ala. 719.

No motion was made on the day indicated in the notice, but there was an order granting leave to the plaintiff to make the motions on a subsequent day which were to have been made on that day, not to continue any motion that had been made. The plaintiff might have done this without such an order, but not without another notice to defendant. The effect of the notice

was thus lost.—8 Porter 125. Again; all the virtue and validity of this notice was lost for another reason: On the day to which the motion was attempted to be continued, there was no court, and no order of any kind taken.

The subsequent appearance was not made until after a judgment by default. An appearance to quash or set aside a judgment for irregularity, certainly cannot be a waiver of that very irregularity. The defendant afterwards pleaded, but not until his motion was decided. The objection that the motion was too late, was not raised in the court below.

The charge of the court on the statute of limitations was erroneous. In summary proceedings like this, there is no case pending until the motion is made; therefore, the making of the motion is the commencement of the suit, and not the act of issuing notice.—1 Stewart 470; 8 Porter 125; 1 Ala. 543; 8 Ala. 344. Six years having elapsed before the motion was made, the statute was a bar.

P. Phillips, *contra:*

1. If there was any irregularity in submitting the motion, or in the previous orders, defendant has waived it, by procuring the judgment rendered at the first term to be set aside, and having the cause put on the trial docket, and continuing it several times.—Crawford v. Bank of Mobile, 7 Ala. 205; Griffin v. State Bank, 6 Ala. 911; Garey v. State Bank, 11 Ala. 771; 13 Ala. 787.

2. The notice stands in the place of both writ and declaration, and its service is the commencement of the action; and, therefore, the statute of limitations was no bar to the motion.—Griffin v. State Bank, 6 Ala. 910; Angell on Limitations 334; 4 Cowen 158.

3. The question as to the sufficiency of the notice of protest rests not only on the recital in the protest, but upon the additional proof that defendant kept an office as attorney and had no clerk, and that the notice was left at his office before night. This brings the case within the decisions of Rives v. Parmley, 18 Ala. 261, and Coster, Robinson & Co. v. Thomason, 19 Ala. 721.

LIGON, J.—1. It is unnecessary to examine into the irregularities alleged to exist in the notice and order of continuance

made by the court on the first day of the term to which it was returnable, inasmuch as we think it well settled, that the subsequent appearance of the defendant at the same term, and his pleading to issue, amounts to a waiver of all exceptions to such irregularities. Where a party appears by counsel and pleads to the merits, he will not afterwards be heard to say that he was not notified by service of process, or that irregularities exist in previous orders of continuance.—Moore v. Phillips, 8 Porter 567; Hobson & Sons v. Emanuel, *ib.* 442; 3 Stew. 480; 9 Ala. 399. Such an appearance and pleading waives all irregularities which may exist in the form and service of the process by which the defendant is sought to be brought before the court. Crawford v. Br. Bank at Mobile, 7 Ala. 205.

This record shows that the defendant appeared at the return term, after the judgment by default had been rendered against him, moved for and obtained an order to set that judgment aside, and to place the cause on the trial docket, and by his attorneys, Cuthbert & Cuthbert, pleaded the statute of limitations and the general issue. It was too late after this for him to avail himself of any thing which was only matter in abatement or discontinuance of the suit.

2. We have already held that, in cases in which Banks are allowed to proceed against their debtors by notice and motion summarily made, the notice is the leading process in the case. (6 Ala. 911.) It is the commencement of an action for the recovery of the demand, and, if followed up by service on the defendant and motion for judgment against him at the time specified in it, it serves the purpose of both *writ* and declaration, and will effectually hinder the statute of limitations from operating a bar, if it had not effected a bar before the service of such notice.

The bare fact that it is at the option of the plaintiff to make or forbear his motion for judgment at the time appointed in his notice, will not be allowed to change this result, any more than the power which the plaintiff possesses to dismiss or discontinue his suit when commenced by *capias* would have such an effect when the suit is commenced by that process. The commencement and prosecution of a suit, in any form authorized by law, is all that is required of the holder of the demand, in order to protect him against the statute.—Angel on Lim. 334; Ross v.

Luther, 4 Cowen 158. In the case under consideration, the Bank commenced proceedings, in the form prescribed by the statute, before six years had elapsed from the time the cause of action accrued, and consequently her demand against the plaintiff in error is unaffected by the statute of limitations.

3. There is no error in the qualification to the first charge asked by the defendant and given by the court. The parol proof of the notary, and the witness who proved that the defendant kept no clerk in his office, should have been referred by the court to the jury, in aid of the certificate of notice accompanying the protest of the notary; and it was for the jury to say, from the whole proof thus taken together, whether the facts would justify the conclusion that the defendant ever received the notice left at his office. The charge has this extent, no more; and is consequently free from error.—Rives v. Parmley, 18 A. R. 261; Coster *et al.* v. Thomason, 19 Ala. 721.

The refusal to give the second charge asked, accompanied, as the bill of exceptions states it to have been, by a reference of the *sufficiency* of the notice to the jury, is not in our opinion entirely free from error. While it is conceded that this charge, in the form in which it was asked, was properly refused, for the obvious reason that it assumes the truth of the facts offered in evidence, and takes from the jury their unquestionable right to pass upon the truth or falsehood of the testimony; yet, it is stated in the bill of exceptions, that the court, on refusing the charge, "left it to the jury to decide as to the sufficiency of the notice." We think it clear, that the province of the jury, in respect to questions of diligence in cases like the present, is confined to the ascertainment of the facts which are relied on by the plaintiff to constitute notice; and it is for the court alone to pass upon the legal sufficiency of these facts to constitute notice. To say, therefore, to the jury, that it is for them to say whether the facts proved constitute due diligence on the part of the holder in giving notice of non-payment to the endorser, is to refer to them a question of law, and is consequently erroneous. Such is the effect of the ruling of the court on the second charge asked by the defendant below.

It is no answer to this, to say that, when the court referred it to the jury to pass upon the sufficiency of the notice, it must be understood to mean that they must ascertain whether the notice

left at the office of Stanley had ever been received by him; that they must find what measure of diligence the proof showed the Bank to have used to give him notice of the non-payment of the note. We do not think the language of the bill of exceptions will bear such a construction, nor can we presume the jury so understood it. The natural and ordinary sense of the words used is, that the jury must pass upon the legal sufficiency of the notice to the endorser, and we must presume that the jury so understood it. The sufficiency of the evidence to establish the fact that the endorser was notified of the non-payment of the note, and the legal sufficiency of such notice when proved, are very different questions; the former belongs to the jury, and the latter exclusively to the court.

But in this case, the question of the sufficiency of the proof to make out the necessary diligence with respect to notice, is properly referred to the jury in the first charge given by the court, and the verdict shows, that, in the exercise of their rightful powers, they find it sufficient to establish such facts as are necessary to constitute notice of non-payment. For when it is shown that a notice, accompanied by a protest of a note for non-payment, is left at the office of an attorney, who is the endorser, and who keeps no clerk, in the afternoon of the day on which by law it is required to be given, the law presumes he received it, and it is sufficient to charge him. The record in this case shows this state of facts, and by this means excludes the idea that any injury has resulted to the plaintiff in error from the exceptionable charge of the court which we have just examined. It is, therefore, error without injury, and does not authorize a reversal.

The cases of Rives v. Parmley, 18 Ala. R. 261, and Coster, Robinson & Co. v. Thomason, use, &c., 19 Ala. 721, each present a different state of facts in respect of notice from the one under consideration, and consequently should not be allowed to control it.

Let the judgment be affirmed.

SMOOT & KETCHUM *vs.* ESLAVA, USE &c.

1. When two joint makers of a note are garnisheed as the debtors of the payee, and answer admitting their indebtedness, if neither of them discloses the fact that they have been notified of the transfer of the note, a payment of the judgment rendered against them on their answer will not discharge them from liability to the real owner; but if one discloses this fact in his answer, and the transferree is thereupon not fied, and fails to appear and assert his rights, he is estopped from setting up any claim against the garnishees.
2. A general objection to evidence of which a part is legal may be overruled.
3. In a contest between garnishees, who have paid a judgment rendered against them, and one claiming by a transfer from the debtor, of which they were notified before they answered, evidence that they paid the money to the clerk in court, who immediately paid it back to one of them as the attorney of the plaintiffs in the judgment, is irrelevant.

ERROR to the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THE plaintiffs in error were garnisheed at the suit of Burke & Co. v. Eslava and others, and answered that they had given certain promissory notes to Eslava, which are particularly described in the answers. Ketchum also answered, that he had been notified that the notes which he referred to in his answers had been transferred to Roberts, the defendant in error. The plaintiffs in the judgments upon which the garnishments issued, contested the right of Roberts to the notes as transferree, and thereupon a notice was issued calling upon him to appear and contest with the plaintiffs in such judgment his right to the notes. This notice was executed, and more than five days afterwards, Roberts having failed to appear at the court to which the notice was returnable, such court rendered judgment, that Roberts be barred from setting up any claim to the notes, and against the garnishees for the amount specified in their answers to be condemned in their hands to the satisfaction, *pro tanto*, of the judgments upon which they were garnisheed.

The record further shows, that the day after the service of the garnishment, the garnishees were sued before a justice of the peace by the defendant in error, upon one of the notes de-

scribed in their answers as garnishees, and that subsequently, and before the filing of such answers, judgment had been rendered against them on the note by the justice. The defendants in this judgment removed the proceedings into the City Court by *certiorari*, and there pleaded to the statement filed against them the garnishment, proceedings and judgment thereon, and that they had paid the judgment so rendered against them as garnishees. On the trial the plaintiffs offered in evidence the note sued on, and other testimony tending to show, that the note sued on had been transferred by Eslava to Roberts, before the service of the garnishments, in payment of a *bona fide* debt, that both of the defendants had been informed of the transfer, and that Smoot knew that Roberts was the owner of the note sued on at the time he answered. The defendants objected to the whole of this evidence as irrelevant, and the objection was overruled.

The plaintiff then proved, that the garnishments were sued out by Smoot, acting as the agent of the judgment creditor; that on the day on which the judgment was rendered condemning the money in the hands of the garnishees, it was paid by them to the clerk of the court, and by him paid back to Smoot as the attorney of the plaintiffs in whose favor it had been condemned. The defendants objected to each portion of this evidence, and the objection was overruled, and judgment rendered in favor of the plaintiffs.

The rulings of the court are here assigned for error.

John T. Taylor, for plaintiffs in error.

C. W. Rapier, *contra*.

GOLDTHWAITE, J.—It has repeatedly been held by this court, that a payment by a garnishee of a judgment rendered against him as such, will protect him against a suit upon the original claim.—Duncan v. Ware, 5 S. & P. 119; Cook v. Field, 3 Ala. 53; Mills v. Stewart, 12 *ib.* 90. In the present case, however, the object was to take the case out of this rule, by showing that one of the garnishees did not, in his answer, disclose the fact that the note in which he was indebted had been transferred to the person who afterwards sued upon it, such fact being within his knowledge at the time he answered. Un-

questionably, if neither of the answers had shown that Roberts claimed an interest in the note, and he not had an opportunity of asserting his right thereto, the garnishees, if advised of the transfer at the time of their answer, would not have been discharged from their liability to the real owner by the payment of the judgment rendered against them.—Rich v. Colvin, 3 Por. 224; Foster v. White, 9 *ib.* 221.

But in the present case, the answer of Ketchum shows that Roberts claimed an interest in the debt, and as he was duly and legally notified that his right as transferree would be contested, he had the oppportunity of asserting that right; of this he did not avail himself, and his failure to appear, when taken in connection with the judgment rendered by the court, estops him from setting up any claim for the note against the garnishees who were parties to the same proceeding.

It is obvious from what we have said, that the evidence on the part of the plaintiffs below, showing that Roberts was the *bona fide* transferree of the note in question, as well as that which tended to prove that Smoot knew that such was the fact, at the time of his answer, was irrelevant. As, however, the record shows that this evidence was offered in connection with the note sued on, which was legal testimony, and the objection was taken to the whole evidence, without distinguishing between the legal and illegal, it was not error in the court to overrule it.—Murrah v. The Bank, 20 Ala. 392.

But in relation to the evidence which proved, that, after the garnishees had paid the amount of the judgment to the clerk of the court in which it was rendered, he immediately paid it back to one of them, as the attorney of the plaintiffs in the judgment, it was irrelevant; and as the objection to this testimony was properly taken, it should have been sustained by the court.

For this error the judgment is reversed, and the cause remanded.

ORTEZ *vs.* JEWETT & CO.

1. In appeal cases from justices of the peace, where judgment is rendered as on issue joined, it is not error to allow the substitution of a lost statement without notice to the defendant.
2. In assumpsit to recover for lumber furnished by plaintiffs to defendant, defendant's agent by whom it was procured is a competent witness for plaintiffs; and evidence that he was indebted to defendant for money advanced on the building contract at the time he procured the lumber is irrelevant.
3. The testimony of a witness on a point not in issue cannot be contradicted, nor can he be questioned about a matter not relevant to the issue in order to lay a ground for impeaching him.
4. When a partnership is plaintiff, and the christian names of the partners are nowhere set out in the summons or declaration, if defendant neither pleads in abatement, nor demurs, but goes to trial on a plea to the action, he will be held to have waived the defect, and cannot assign it for error.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. LYMAN GIBBONS.

J. F. JEWETT & Co. recovered a judgment against Diego Ortez before a justice of the peace, which the defendant removed by appeal to the Circuit Court, where plaintiffs again recovered judgment. The facts of the case, and the errors assigned, will be readily understood from the opinion.

GEO. N. STEWART, for plaintiff in error.

WILLIAM BOYLES, *contra.*

PHELAN, J.—It appears that the court below allowed a statement which had been lost to be substituted after judgment, but the record does not show that the plaintiff in error had notice of the motion.

It was decided in Wilkinson v. Branham, 5 Ala. 608, that, although it was a proper practice to require notice to be given in such a case, yet, if it was done without, the action of the court was not reversible. But this court has also decided, that where a judgment is rendered as on issue joined, if a declaration or plea is wanting, we will intend that they have been lost

from the files, so that the want of a declaration in such a case is not assignable for error, even if we reject the statement which was substituted.—Wheeler v. Bullard, 6 Por. 352; Castleberry v. Pearce, 2 S. & P. 141.

The witness, Randolph, on his examination swore that he was not indebted to Ortez at the time he procured the lumber from the plaintiffs. The defendant, in order to show that this witness was incompetent from interest, and also to impeach his credibility, offered to prove, first, that at the time the lumber was procured he held a written contract from said witness, by which he bound himself to build for defendant certain houses and furnish materials by a given time for a certain sum, and produced the contract; secondly, that at that time the witness was indebted to the defendant for advances of money made to him not due by the contract; thirdly, that he afterwards abandoned his said building contract, and agreed to discharge the defendant from all further claim on account of the same, in consideration of the money that had been advanced, and produced a receipt from the witness to that effect, by which defendant also agreed to receive the work that had been done and the materials furnished in satisfaction of what had been paid.

All this testimony was rejected by the court, as being incompetent for either purpose; that is, to show an interest in the witness, or to impeach his credibility.

The issue presented by the pleadings was the liability of Ortez, the defendant, to Jewett & Co., the plaintiffs, for the lumber alleged to have been sold by them to him. Randolph testified that he procured it for Ortez as his agent.

It cannot be pretended that he was incompetent from interest on account of being agent. It is equally clear, that whether he was indebted to Ortez or not, for money advanced on the building contract, at the time he procured the lumber, could not in any manner affect the question as to whether or not he was interested in this suit. The testimony offered did not, therefore, tend to show any such interest and was irrelevant, and so properly rejected.

But he testified that he was not indebted to Ortez, and this evidence was offered to disprove that—to contradict, and so impeach him on this question of fact. The matter was irrelevant, and defendant might have objected to the question. But in

such a case, it being a question upon a point not in issue, his answer must be taken as true, and cannot be contradicted. You cannot question a witness, or allow the other party to question him without objection, about a matter not relevant to the issue, in order to lay a ground to impeach him by calling witnesses to disprove what he says.—1 Green. Ev. §§ 449, 462.

The last assignment of error is, that the christian names of the partners composing the firm of J. F. Jewett & Co. are not any where set out in the proceedings.

We have decided, that when the summons contains only the firm name of the partnership, the defect may be cured by setting out the names in full in the statement, in cases of appeal from a justice of the peace.—Snow & Co. v. Ray, 2 Ala. 344. There are cases to be found, which decide that if the defect is carried into the statement or declaration, it can be reached by a general demurrer.—Hayes v. Lanier, 3 Blackford 323; 5 *ib.* 295. And by the same principles, if the judgment had been by default, or even by *nil dicit*, the defect could have been reached by motion in arrest, or assigned for error.—Reid & Co. v. McLeod, 20 Ala. 576; Emanuel v. Ketchum, 21 *ib.* 257. But if the opposite party neither pleads in abatement, nor demurs, but goes to trial on a plea to the action, he will be held to have waived the defect in the declaration.—Martin & Cornwell v. Kelly, Cheves' R. 216.

Let the judgment be affirmed.

MIMS *vs.* STURDEVANT AND WIFE.

1. The declarations of one who is in possession of personal property, explanatory of his possession, are admissible evidence; but his declarations in regard to the contract by which he came into possession, are not admissible evidence in his favor.
2. Injury will be presumed from error, unless the record itself rebuts the presumption, and shows affirmatively that no injury could have resulted.
3. When incompetent evidence is admitted, when objected to, on the trial of an issue before the Court of Probate, the decision of the court may be revised on error, although the issue was tried without the intervention of a jury.

ERROR to the Court of Probate of Monroe.

The defendants in error suggested to the court below that the executors of Britton Mims, deceased, had failed to charge themselves in their inventory with a certain negro, named John, the property of said estate. Stanford Mims, the plaintiff in error, who was one of said executors, claimed said negro as his own property; and thereupon an issue was formed between the parties to try this question, which was decided by the court without the intervention of a jury, without objection from either party so far as the record discloses.

On the trial of this issue, the defendants in error offered proof tending to show, that said negro was purchased by said Stanford for and on account of said Britton, and with the money of said Britton; and the plaintiff in error offered evidence tending to rebut this proof, and to show that he purchased said negro with his own means, and on his own account, and that he had exercised ownership and control over him from the time of said purchase up to the death of said Britton. In support of their part of the issue, the defendants in error offered a witness, who testified, "that he was present previous to the purchase of said negro, when money was counted out by Britton Mims and wife, which they stated was for the purchase of John." The plaintiff in error objected to the admission of this evidence, it being shown that he was not present at said conversation; but his objection was overruled, and he exceepted. The court decided, on the evidence before it, that the negro belonged to the estate of said Britton Mims, deceased. The error assigned is, the admission of the evidence above set forth to which exception was duly taken.

The case was before this court at a former term, but was never reported.

R. C. TORREY, for plaintiff in error.

S. J. CUMMING, *contra.*

GIBBONS, J.—The sole question presented for our determination is, whether the court below erred in the admission of the testimony to which exception was taken, and the ruling of the court upon which is here assigned for error.

When this case was here at a former term, the testimony then

excepted to was as follows: "Thomas H. Brown, being offered as a witness, testified that, whilst the testator was in the possession of the slave, he stated to the witness that he had sent eight hundred dollars by Stanford Mims to purchase the slave, and that he had bought him for six hundred and five dollars." The admission of this testimony was on that occasion held by this court to be erroneous. C. J. Dargan, in commenting upon the evidence, says: "The declarations or admissions of one in possession of property explanatory of his possession, as that he held in his own right, or as a tenant or a trustee of another, are admissible evidence, because it explains the character of his possession; but his declarations in regard to the contract by which he came into possession cannot be received as evidence in his favor. This rule has often been repeated by this court, and must be considered as the settled law.—McBride v. Thompson, 8 Ala. 650; Cox v. Easley, 11 Ala. 362; Thompson v. Mawhinney & Smith, 17 Ala. 362.

Applying this test to the evidence, we think it was inadmissible. The declarations of the testator did not refer to his possession, but were merely descriptive of the contract by which he obtained possession; consequently, they should have been rejected. The language employed by the late Chief Justice in reference to the testimony then under consideration, in our opinion, applies with equal force to the testimony drawn in question by the present bill of exceptions. The testimony offered and admitted by the court below was, that on a certain occasion witness was in the presence of Britton Mims and wife; that they then counted out some money, and stated that it was for the purchase of the negro boy John. The mere act of counting the money would not, in our opinion, have any relevancy or pertinency to the issue, without the accompanying declarations that it was for the purchase of the negro boy in question. These declarations could in no sense be considered explanatory of any possession, as possession merely, then had or in contemplation by the elder Mims, but must rather be considered as descriptive of the title by which he intended to acquire and hold the boy.—Such declarations fall directly within the influence of the cases above cited, and are entirely covered by the opinion of the late Chief Justice in this case when it was on a former occasion before this court.

But it is insisted, that, although the testimony is inadmissible by the strict rules of evidence, yet its admission could work no injury to the plaintiff in error, as the proof was abundant in favor of the decision of the court upon the facts without this evidence. It is true, the bill of exceptions sets out much other evidence; but it is not for this court to say that the proof was abundant without the evidence in question, and that therefore no injury could accrue from the admission of the testimony. The rule of this court is, that it will presume injury from error, unless the record itself rebuts the presumption.—*Ex parte* Keenan, 21 Ala. 558; Frierson v. Frierson, *ib.* 549; Dave v. The State, 22 Ala. 23. This the record, in our opinion, does not do. We may have our own private opinion as to which side has the advantage in the weight of testimony offered, but we cannot pretend to say that the court below was not materially influenced in its decision by the evidence in question. If the defendants in error would avail themselves of the principle which they invoke, they should show by the bill of exceptions, or in some other manner by the record, that the court below was in no respect influenced by the testimony admitted, or that no injury in fact resulted to the plaintiff in error from the ruling of the court. This the record no where shows.

Again; it is insisted that, inasmuch as the court below decided the issue without a jury, its decision is not revisable by this court; and in support of this position is cited the case of Barnes v. Mayor and Aldermen of Mobile, 19 Ala. 707, and Botts v. McCoy & Johnson, 20 Ala. 579.

The principle here relied upon in argument is admitted to be correct, but, as we conceive, has no application to the question under consideration. We are not called upon to revise the decision of the court below upon the facts in evidence, nor is the correctness of the judgment of that court here drawn in question upon the proofs before it. But the question here is one purely of the competency of the evidence offered. The court below decided it to be competent, and as such admitted it. In this we think the court erred, and for this error the judgment of the court is reversed, and the cause remanded.

MAZANGE *vs.* SLOCUM & HENDERSON.

1. Actions and proceedings commenced before the Code took effect are governed by the old law as to all continuous proceedings had in the court in which they are pending; but proceedings in the nature of a new action, although predicated upon the determination of the court had under the old law, if commenced after the Code went into operation, must conform to its provisions.—(Code of Alabama § 12.)
2. Section 3016 of the Code, abolishing writs of error, and giving an appeal in lieu thereof, applies alike to jn gments rendered before and since the 17th January, 1853, the day on which the Code went into operation.
3. When a cause is stricken from the docket of the Supreme Court for want of jurisdiction, no costs are recoverable.

ERROR to the Circuit Court of Monroe.

MOTION is made to dismiss the cause from the court for want of jurisdiction, the writ of error having issued since the 17th January, 1853, the day on which the new Code went into operation.

S. J. CUMMINGS, for the motion.

R. C. TORREY, *contra.*

CHILTON, C. J.—The Code abolishes writs of error in civil cases, and gives an appeal, as matter of right, in lieu thereof. See section 3016.

The appeal under this section, like the writ of error for which it is substituted, is a new proceeding, and is the commencement of proceedings in this court to revise the final action of the court below, and cannot be regarded as the continuation of proceedings in the primary court. It is, therefore, unaffected by the twelfth section of the Code, which declares that "no action or proceeding commenced before the adoption of this Code, is affected by its provisions." The meaning of this twelfth section is, that actions and proceedings commenced before the Code took effect are governed by the old law as to all continuous proceedings had in the court in which they are pending; but proceedings in the nature of a new action, although predicated upon the determination of the court had under the old law, if com-

menced after the Code went into operation, must conform to its provisions.

As to the limitation for suing out appeals: section 3040 of the Code, which reduces the time two years, at the same time excludes judgments rendered before it took effect, leaving such judgments subject to the three years limitation as provided by the old law.

But section 3016 is general in its terms, and prescribes the manner in which this court is to take jurisdiction for revising the judgments of the inferior courts in civil cases, and applies alike to judgments rendered before as to those rendered after the Code went into operation. The proceeding to revise them must conform to the provisions of the new law.

The writ of error in this case having issued since the 17th of January, 1853, gives this court no jurisdiction, and the case stands upon the docket as though no writ of error had been sued out. There is no warrant therefore for putting it on the docket, and it must be stricken from it. It is clear that no costs can be allowed in such case.

SANDFORD *vs.* OCHTALOMI.

1. When the defendant in execution files a bill to redeem, he must allege in his bill that he delivered possession to the purchaser without suit, or that the latter consented to his retention of possession as tenant.
2. Relief cannot be granted beyond the allegations of the bill, even when there is ample evidence to justify it.

ERROR to the Chancery Court of Barbour.

The record does not show the name of the Chancellor who presided.

DAVID OCHTALOMI filed his bill for the redemption of his interest in a certain lot of land situated in the town of Glennville, which had been sold under execution by the sheriff of Barbour on a judgment at law against complainant. The bill alleges

that the land was purchased at the sale by Thomas Flournoy, for the sum of $40, and was afterwards by him sold and conveyed to the defendant, Adolphus M. Sandford; that complainant, being desirous of redeeming said land, tendered to said Sandford, on the 3d April, 1851, the amount of the purchase money, "with $5 interest, being at the rate of ten per cent. per annum on said principal sum," with all other lawful costs and charges incurred by the purchaser or defendant about the premises, together with the cost of a re-conveyance, and demanded a re-conveyance of the premises, which defendant refused. The bill also makes the same tender in court.

The defendant being served with subpœna, and having failed to answer, a decre *pro confesso* was taken against him, and the cause was finally heard on the bill and decree *pro confesso.*—The Chancellor decreed a re-conveyance to complainant, and ordered a reference to the master, to ascertain what rents had accrued from the time of the sheriff's sale to the taking of the account; and the master having reported such rents to be $86 60, a money decree was also rendered against defendant for $40 60, and execution awarded for that sum, and also a writ of *habere facias possessionem.*

The defendant prosecutes a writ of error from this decree, and here assigns it for error.

P. T. Sayre, for plaintiff in error.

E. C. Bullock, *contra.*

LIGON, J.—The decree in this case cannot be sustained for two reasons: first, because the allegations of the bill are not sufficient to entitle the complainant to the relief he seeks; and, second, because the relief granted by the decreo extends beyond that which the allegations of the bill will justify.

1. By the first proviso to the fifth section of the act "to prevent the sacrifice of real estate," (Clay's Dig. 503 § 5,) it is enacted, "that the defendant in execution, if in possession at the time of the sale, shall deliver possession to the purchaser without suit." To entitle the defendant in execution to redeem, this fact should be distinctly charged in the bill, and must not be left to inference or conjecture. It is as essential to the equity of his bill under the statute, as either of the other facts

required by it to entitle him to relief. A bill which failed to aver a tender, and that such tender was made within two years from the sale of the premises, would not, we presume, be entertained for a moment; and yet these are not more positively required by the statute than a surrender of the possession without suit by the defendant in execution.

It is true, the actual surrender may be excused, if it is alleged that the purchaser consented that the defendant in execution might retain possession as his tenant; but then this must appear by the bill, and, if denied, must be proved, before any relief will be granted.

2. There are no allegations in this bill which would authorize the Chancellor to take an account between the parties, except as to the amount of money necessary to redeem the premises.—It is true the complainant alleges that he tendered the sum required by law, and demanded a re-conveyance several months before the filing of the bill, and that it was refused by the plaintiff in error. But there is no allegation, any where to be found, from which it appears that the possession of the lot was changed on or after the sale by the sheriff; or that either Flournoy or the plaintiff in error ever received any rents, or that either of them ever was in possession by himself or tenant for a single hour. Under this state of the case there is no allegation in the bill to justify the taking an account of rents, or support a decree for the sum reported by the master to be due on that account.

The rule is, that no decree can be rendered which is not founded on an allegation in the bill, and this, notwithstanding there may be ample testimony to justify it.—Boazman *et al.* v. Draughan, ex'r, 3 Stew. 243; Borland v. Phillips, 3 Ala. 718; McKinley v. Irvine, 13 Ala. 681.

If this bill contained an allegation that the plaintiff in error held possession of the premises after a tender had been made as is required by the statute, it would, perhaps, be proper to take an account of rents accruing after that time. But the purchaser cannot, in any case, be made to account for rents accruing before the tender, except when he has made improvements for which the defendant in execution is bound to pay under the fifth section of the act above referred to, and then they are to be applied only as sets-off against such improvements. Should they

exceed the value of the improvements, no decree can be rendered for such excess.

As the defect in the bill may be supplied by an amendment, if the facts of the case will justify it, the decree must be reversed, and the cause remanded.

McGINTY *vs.* MABRY, Guardian &c.

1. The wife is a necessary party to a proceeding to compel a final settlement of her guardianship of a minor child, and a decree against her husband only is erroneous.
2. A point which was not presented in the court below in any shape, cannot be noticed in the Appellate Court.

Appeal from the Court of Probate of Barbour.

George W. McGinty and Elizabeth, his wife, were cited before the Court of Probate to make a final settlement of the said Elizabeth's guardianship of her minor son, Moses Griffith. Their accounts were audited and stated, showing a balance in the hands of the said guardian of $594 50. Legal notice by publication having been given, the court proceeded to render a final decree, which is as follows: "It is therefore ordered, that the said account of the said guardian as stated be allowed, and recorded and filed; it is further ordered, that Seth Mabry, the present guardian of the person and property of the said Moses Griffith, recover of the said George W. McGinty, guardian in right of his wife Elizabeth, late Elizabeth Griffith, the guardian of Moses Griffith, a minor, the said sum of $594 50, as a balance of the assets of the said ward remaining in the hands of said guardian, as also the costs in this behalf expended, for which execution may issue."

This decree is now assigned for error.

P. T. Sayre, for plaintiff in error.

PHELAN, J.—The only ground upon which the liability of McGinty, the husband, can be based, is his intermarriage with

Mrs. Griffith, who, previous to her marriage with him, was guardian to her minor son by a former marriage, now the ward of the defendant in error.

It is well settled, that the husband cannot be sued alone, for the debts of the wife contracted before marriage.—Gage v. Reid, 15 Johns. 403; 7 Term R. 348. The same principle will cover every species of civil liability incurred by the wife before marriage, whether by tort or contract, in her own right or as administratrix or guardian.—2 Williams on Executors 632; Bacon's Abr., Title Baron and Feme; 5 Johns. 66; Williamson v. Hill, 6 Porter's R. 184. It being necessary to make the wife a party to this proceeding for a final settlement of her guardianship, a decree against her husband only was of course erroneous.

The point made in the argument of plaintiff in error, that the husband is not liable at all under the statute of 1846, (Pamphlet Acts 25,) which declares that the husband shall not be "liable to pay the ante-nuptial contracts or liabilities of the wife further than the property received by the wife," was not presented in the court below in any shape, and cannot be noticed here.

For the error in not rendering a decree against both husband and wife, the judgment of the court below is reversed, and the cause remanded.

HOWARD *vs.* INGERSOLL.

1. An action for damages for injuries done to land must be brought in the courts of the State in which the land is situated.
2. When suit is brought in the courts of Alabama, for an injury to lands averred to be located in "the State of Georgia, to-wit: in the county aforesaid," a demurrer would not lie to the declaration, and a joinder in issue by defendant would not amount to a waiver of the jurisdictional question which would arise if the evidence showed that the land was located in Georgia.

THIS case comes back to this court from the Supreme Court

of the United States, where the previous judgment of this court, rendered at the January term, 1850, was reversed, and the cause remanded. For the facts of the case, see 17 Ala. 781, and 13 Howard's U. S. R. 381.

GOLDTHWAITE, J.—This court at the January term, 1850, affirmed the judgment which had been previously rendered by the Circuit Court of Russell County. The case was carried by writ of error into the Supreme Court of the United States, where the judgment rendered by this court was reversed, and the cause remanded, to be proceeded with in conformity with the opinion there delivered.

A motion is now made by the defendant in error, to affirm the judgment of the Circuit Court, upon a ground which, it is insisted, is distinct and independent of that upon which the judgment was previously affirmed, and which consequently was not presented, and did not enter into the consideration of the Supreme Court of the United States. This ground is, that the record shows that one count in the declaration was for overflowing the plaintiff's mill in the State of Georgia; that the evidence sustained this count; that this being the case, the plaintiff below was entitled upon the evidence to recover, without reference to the boundary line between this State and Georgia; and in that aspect, as the fact whether that line run east or west of the premises of Ingersoll made no difference, the error of the court in relation to it could not affect the right of the plaintiff below to recover. In other words, that the record shows that the plaintiff was entitled to recover upon the evidence, conceding the line as defined by the Supreme Court of the United States.

We do not think this position can be sustained. There is no count in the declaration which is, in legal effect, for overflowing the mill of the plaintiff in Georgia. We say "in legal effect," because the place, "in the State of Georgia," in which the mill is averred to be located, is stated under a *videlicet*, the office of which is to mark that the party does not undertake to confine himself to the place thus laid.—1 Green. Ev. 68; McDade v. The State, 20 Ala. 81, and cases there cited. As the plaintiff would not have been required, under this allegation, to have proved the location of the mill in Georgia, a demurrer could not

have been sustained upon that ground, and the joinder in issue by the defendant did not amount to a waiver of the jurisdictional question, which might be taken advantage of upon the evidence. When the case was last before this court, Chief Justice Dargan said: "The principal, if not the only question in this case, is, whether the mill, for the overflowing of which the suit is brought, is situated within the limits of the State of Alabama. If it is, the plaintiff has shown title to the land on which the mill is erected, and the suit is properly brought in the courts of this State. If, however, the mill is not situated within the limits of this State, then no suit can be brought in our courts to recover damages for the injury done to it, whether the plaintiff has title to the land or not; for the action is local in its character, and can only be brought in the State in which the property is situated. The law is well settled, that all actions or suits to recover land, or to recover damages for injuries done to land or real property, must be brought in the courts of the country where the land is situated.—Story's Con. Laws § 554, and cases there cited."

The boundary line between Alabama and Georgia, as defined by the Supreme Court of the United States in the present case on error to that court, is a line running on the top of the western bank of the Chattahoochee river, along the inner edge of such bank; and however much we may feel constrained to differ from that high authority, as to the conclusion to which they have attained, it is the duty of this court, while the decision remains in force, to recognize it as the law. Adopting this as the boundary line, it is clear from the evidence as stated in the bill of exceptions, that the mill for the overflowing of which the action was brought, was in Georgia, and the principle asserted by Chief Justice Dargan must operate, unless the joinder in issue has operated to withdraw the case from its influence.

As we have before said, in the last count the place where the mill is situated is laid under a *videlicet*, "to-wit: in the county aforesaid," and is, in legal effect, equivalent to locating the mill in Russell County, Alabama. The charge of the court asserted the legal proposition, that the plaintiff was entitled to recover although his mill was situated in Georgia. This was erroneous. If the defendant had upon this evidence requested the court to charge, that if the plaintiff's mill was in Georgia, that the ac-

tion could not be maintained, the refusal to give that charge would have been error.

The judgment must be reversed, and the cause remanded, to be proceeded with in conformity with the opinion of the Supreme Court of the United States.

CASSELL *vs.* COLLINS.

1. A verbal contract to pay for improvements on land held adversely to the promisor, in consideration that the tenant would attorn to him and pay him rent for his unexpired term, is not within the statute of frauds of this State.

ERROR to the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

ASSUMPSIT by Joseph Cassell against Sidney E. Collins, on the following facts, as shown by the bill of exceptions:

On the 23rd June, 1851, Cassell was in possession of a small lot and tenement at the corner of St. Anthony and Commerce streets, in the city of Mobile, deriving his possession from one Lowry, who had rented the lot from one Meslier, who claimed to be the owner and proprietor of it; Lowry had rented for one year from the 1st October, 1850, and after he took possession had built the tenement aforesaid; he afterwards sold out to Cassell his lease and all his interest in the premises, the latter allowing him $130 to $137 for said tenement; Cassell then took possession of the premises as tenant of Meslier, acknowledged him as his landlord, and paid him rent; about the 23rd June, 1851, aforesaid, Collins went to Cassell, representing that he had recently recovered said premises in an action at law, and claiming the possession, which Cassell refused to surrender; thereupon Collins proposed, that, if Cassell would attorn to him, and pay him rent instead of Meslier, he would pay Cassell, at the termination of his lease, for the tenement aforesaid built by Lowry, as much as any two honest men would say it

was worth; Cassell accepted this proposition, attorned to Collins, paid him rent for his unexpired term, and surrendered to him the premises at the close of his term; Collins refused to comply with his said agreement, or to pay Cassell the value of said tenement, which had been estimated by a brick-mason and a carpenter, both honest and competent men, at $105, for which amount this suit was brought.

On these facts the court charged the jury, that they must find for the defendant, and this charge is now assigned for error.

A. J. Requier and Percy Walker, for plaintiff in error:

1. A promise to pay for improvements is not within the statute of frauds.—7 Cowen 263; 11 Johns. 145; 5 Johns. 272. Nor was the promise a *nudum pactum*, for the want of a consideration. The evidence shows that there was a benefit to the party promising. The defendant in error was to pay for the improvements, and the plaintiff was to acknowledge tenancy. Here was a mutuality.

2. Our statute of frauds is not, in its terms, as broad as the English, which not only embraces any contract for the sale of lands, but also "any interest in or concerning them." But, admitting that the word tenements would give our statute as extensive an operation as that of Charles 2nd, still that construction would not bring the case within it, as a promise to pay for improvements cannot be regarded as a contract either for the sale of lands, or of any interest in or concerning them. The clause of the statute under review contemplates only a transfer of the title to the land or some interest therein. Here, the contract was not for the sale of land, nor relating to the sale of land. The title had nothing to do with the contract, nor did the latter in any just sense embrace any interest in the land. The plaintiff in error transferred no title, nor did defendant take any interest from him.

3. If the contract had been for the possession of land, it might possibly have fallen within the statute, as possession would perhaps be considered as an interest in land. But, there was no contract for the possession, and the record shows that the plaintiff in error remained in possession until the expiration of his lease.

4. The operation of the statute is limited to such executory

contracts, as have been in no substantial part executed.—15 Mass. 85, 92; 7 Ala. 161; 2 Bing. 437. The case at bar is not of this class. The action is founded on an executed consideration, and the statute does not apply.

Daniel Chandler, *contra*, insisted, that the contract proved was equally obnoxious to the statute of frauds, whether it was regarded as a contract for the sale of the tenement itself, or for the lease and possession of the lot, or for the tenement, lease and possession combined; that the words "lands, tenements and hereditaments" have such an extensive signification, that they include every thing embraced by the English statute; and he cited the following authorities: Roberts on Frauds 126; 1 Shep. Touch. 91; 2 Black. Com. 17, 18; 1 Denio 556; 5 Johns. 272; 7 Cowen 263; 7 Johns. 205; 10 English Law and Equity R. 517; 2 Ala. 625; 1 Green. Ev. § 271.

GIBBONS, J.—On the above stated facts the court below charged the jury, that they must find for the defendant. The court, doubtless, gave this charge under the impression that the contract which the proof tended to establish was within our statute of frauds, and therefore void unless the same was in writing; and the question now presented is, whether said contract is within the statute of frauds or not.

It will be observed that our statute, in its terms, is somewhat more restricted than that of the English statute. The language of our act is, "or upon any contract for the sale of lands, tenements or hereditaments," whilst the English statute has superadded the words or any "interest therein." These latter words, it is conceived, render the statute much broader in its terms than it would be without them. Hence it is, that a certain class of cases in England upon this statute, and in New York where the English statute has in terms been adopted, do not apply to cases in this State, as many contracts are clearly within the terms of those statutes (being for or concerning an interest in lands, tenements or hereditaments) which would not be within the terms of ours.

This remark is particularly true of the case of Howard v. Easton, 7 Johns. 205, and of Kelly v. Webster, 10 Eng. Law and Equity R. 517. We need not now decide whether or not

the case at bar falls within the influence of the cases of Frear v. Hardenburgh, 5 Johns. 271, Lower v. Winters, 7 Cowen 263, and Benedict v. Beebee, 11 Johns. 145. In these latter cases it is held, that a contract respecting the improvements merely on land, irrespective of the soil or freehold, is not within the statute of frauds, even in New York. Such a contract is to be considered rather as an agreement respecting work and labor done, than as a contract for the sale of lands or of an interest in them. Independent of these decisions, we consider the present case to fall within the principle of the case of Scoggins v. Slater, at the last term of this court. That was an action of assumpsit, brought to recover a sum of money agreed to be paid for certain improvements on lands. At the time of the contract the plaintiff had the lands and improvements in his possession, and on making the contract for the sale of said improvements the plaintiff put the said vendee in possession of said houses, &c., which he retained until his death. The contract was by parol, and it was insisted that it was within our statute of frauds; but this court decided otherwise, and held that the plaintiff could recover the sum agreed to be paid for said improvements by said contract. In commenting upon this case, the Chief Justice remarks: "This is not a contract for the sale of lands, and, in our opinion, is not obnoxious to the statute requiring such contracts to be in writing. Under our statute for the relief of tenants in possession, holding adversely a given time against dormant titles, it frequently may happen that the tenant is entitled to pay for his improvements, and the statute points out the mode in which he can recover.—Clay's Dig. 320 § 47. Now, if, instead of litigating the question, the parties agree on the value of the improvements, and the tenant surrenders them to the owner of the land on his promise to pay a given sum, we see no reason why he may not be entitled to recover the sum thus agreed to be paid." This language we consider equally applicable to the case at bar. Cassell, the plaintiff, is in the possession of certain premises as the tenant of Meslier, and of course holds adversely to the defendant. The defendant, claiming to have recovered the premises in question by action at law, goes to the plaintiff and demands the immediate possession of said premises; this the plaintiff refuses to yield. The parties then commence a negotiation about the possession, which results in

a contract, by which the plaintiff is to repudiate his tenancy to Meslier, attorn to the defendant, and pay him rent for the unexpired term for which he holds; and the defendant, in consideration thereof, agrees to pay to the plaintiff for his improvements made upon the lands as much as any two honest men should say they were worth. This contract being parol merely, under the decisions of Howard v. Easton and Kelly v. Webster, *supra*, would be obnoxious to the English and New York statute of frauds, and could not be enforced; but under our statute, as interpreted in the case of Scoggins v. Slater, *supra*, is not liable to that objection.

Our conclusion, therefore is, that the court below erred in its charge to the jury; and the judgment is therefore reversed and the cause remanded.

SEGAR *vs.* KIRKLEY.

1. If defendant continues in actual possession after a recovery and satisfaction in trespass *quare clausum fregit*, plaintiff cannot maintain a second action against him for a continuation of the trespass, unless he shows a title which would carry with it the constructive possession.

ERROR to the Circuit Court of Russell.

Tried before the Hon. ROBERT DOUGHERTY.

THIS was an action of trespass, *quare clausum fregit*, by Kirkley against Segar. Plea, not guilty, with leave to give special matter in evidence, &c. Verdict and judgment for plaintiff below for fifty dollars.

Upon the trial a bill of exceptions was sealed, by which it appears that the plaintiff, in order to entitle himself to vindictive damages, the action being for a continuation of trespasses, was allowed to read, against the defendant's objection, as evidence to the jury, the record of a former recovery for a similar trespass upon the same land, of thirty-five dollars, had in a suit between the same parties, commenced before the present suit, and determined at a previous term of the court.

The evidence conduced to show, that the plaintiff had erected some houses, and had enclosed and was cultivating a portion of the south-west quarter of section twenty, township 17, range 28, in Russell County, which is the *locus in quo;* and that the defendant, before the commencement of the former suit, had cleared and enclosed some fifteen acres of said land, embracing the improvements previously made on the land by the plaintiff, a portion of which improvement was made by the defendant's consent; that upon enclosing these fifteen acres in February, 1850, said defendant had removed the plaintiff's fences, and had thrown down his houses, and had continued to cultivate the fifteen acres so enclosed from February, 1850, until the trial of this cause.

1. The plaintiff offered to prove the value of the rents of the fifteen acres, which were enclosed and cultivated by the defendant as above stated. The defendant objected to this proof as irrelevant and illegal; but the court overruled the objection, and he excepted.

2. The defendant then offered to prove the value of his improvements made on the land; which proof the court rejected, and he excepted.

3. The proof conduced to show, also, that the defendant claimed under an informal tax sale, and had the deed of the tax collector for the south half of section twenty, township seventeen, range twenty-eight, and that the plaintiff claimed the south-west quarter, on which his improvements were made, and which he had in possession until it was enclosed by the defendant, which was done before the commencement of the former suit. The plaintiff had never retaken the possession, but the defendant had retained it, and cultivated the land from a period anterior to the commencement of the former action.

Thereupon, the defendant asked the court to charge the jury, that, although they might believe from the evidence that, before said former suit was brought, the plaintiff had actual possession of a part of said close, and that the defendant had committed a trespass upon and entered into such part before said former suit was commenced, yet, if they also believed that such trespass was proved on the trial of the former suit, and a recovery was had therefor in said former suit, and that the plaintiff had never since such trespass and entry by defendant had pos-

session of said part of said close, and has ever since continued to hold and cultivate the same, then the plaintiff could not recover for his thus continuing in possession. This charge the court refused to give, and defendant excepted.

4. The defendant asked the further charge, that the plaintiff must show, under the general issue, in order to recover, that he had the rightful possession, as against the defendant, of the premises, at the time the injury was alleged to have been committed by the defendant with force. This charge was also refused, and the defendant excepted.

These rulings of the court are assigned for error.

Belser & Rice, for plaintiff in error, cited 1 Chitty's Pleading 175, 177, 178, 179; 7 Term R. 431; Smith v. Wilson, 1 Dev. & Bat. 40; Bennett v. Holmes, *ib.* 486.

No counsel appeared for the defendant.

CHILTON, C. J.—For the trespass in making the entry and depriving the plaintiff in the court below of his possession, the defendant made satisfaction in the former suit brought against him to recover for these wrongs, and as he is not entitled to double satisfaction, it follows that he can have no recovery for any injury which was proved and properly cognizable in the first suit.

In Coleman v. Parish, 1 McCord's Rep. 264, it was held, that a recovery of damages in trespass on lands was a bar to a subsequent action for mesne profits; see also 3 Phil. Ev. C. & H.'s Notes, p. 960. This action must consequently be maintained, if at all, upon the ground that the defendant below has retained the possession of the land, and has cultivated it since the trial of the former suit, and not for breaking the close or damage done anterior to the trial in that suit.—Cummings *et al.* v. McGhee, 9 Port. 349. But can it, under the facts as detailed in the bill of exceptions, be maintained at all? We are of the opinion that it cannot. According to all the English authorities, the plaintiff must have the actual possession, in order to be entitled to this remedy.—Chitty's Pleadings pp. 175-7-8-9, and cases cited by this author. In this State, however, so early as 1827, it was held, in Gillespie v. Dew, 1 Stew. Rep.

230, that the situation of this country required that the rule should be so modified as to give the remedy to one who has the title, though he has never been in actual possession, in cases where the land is vacant, or there is no one in the adverse possession; in other words, where the plaintiff has a constructive possession. The same doctrine has since been several times affirmed by our predecessors.—See Blackburn v. Baker *et al.*, 7 Porter 288; Blevins v. Cole, 1 Ala. 210; Cummings *et al.* v. McGhee, 6 Por. 349.

In the subsequent case of Fry v. The Branch Bank of Mobile, 16 Ala. 282, it was held, that an action of trespass *quare clausum fregit* would not lie in this State, in favor of a disseizor, to recover *mesne profits*, unless he has regained the possession *by entry*.

In Shipman v. Baxter, 21 Ala. 456, this court held, that in this action (*tres. quare clausum fregit*) for an injury to the possession, if no actual possession is shown, the right of recovery depends upon the title, which draws to it constructive possession; and that where neither party was shown to have had actual possession, it was erroneous for the court to instruct the jury that the defendant would not be liable for cutting trees upon the land, (the injury complained of,) if he did so under the *bona fide* claim and assertion of title to the land, which at the time he thought to be good.

Upon a slight examination, it might be supposed that the two cases last cited were not altogether reconcilable with each other, but limiting them respectively to the facts of each case, there is really no discrepancy.

The first charge asked, when taken in connection with the evidence, assumes that if Segar, holding a tax collector's deed, entered on the land, and by his entry and removal of complainant's improvements, &c., committed a trespass, for which, in a previous action, he had made satisfaction, he was not liable in this suit; and if the possession by the parties of the land had remained unchanged since the former suit, and the defendant had merely continued to hold and cultivate the land, the plaintiff, never having re-taken the possession since he lost it by the defendant's original entry, could not recover. It does not appear that either party showed a valid title to the land, so that there could have been no constructive possession; but if the plaintiff

below had shown a good title, he could not have been constructively in possession, when it is shown that, during the whole time which has elapsed since the former trial, the defendant has held adverse possession, by which we mean an actual possession, notoriously hostile, under claim of title.—See Finche's Ex'rs v. Alston, 2 Stew & Por. 85, where it is said, "To consider the defendant constructively in possession, when the plaintiff was actually so, would be drawing an inference which no state of the case would warrant,"—per Taylor J. But the case before us cannot be made plainer than by the bare statement of the propositions it involves. It is conceded by all that to maintain this action (*trespass quare clausun fregit*) the plaintiff, at the time of the injury complained of, must have either the actual or constructive possession.—Shipman v. Baxter, 21 Ala. 456. He had not the actual possession, for the record says the defendant had that; he had not the constructive, for that arises out of a title, and he showed none. Therefore, having shown neither actual nor constructive possession, he has no right to avail himself of this remedy, and the charge refused was correct and should have been given.

Let the judgment be reversed, and the cause remanded.

YONGE *vs.* BROXSON.

1. When the clerk's name is subscribed to a writ, to which is attached an affidavit that the name was subscribed by the affiant by authority of the clerk, the affiant must be taken to have been the clerk's deputy, and the writ is properly issued.
2. It is not necessary that a writ should on its face specify the place at which the court is to be held, or the first day of the term to which it is returnable; these are fixed by law, and suitors are presumed to be cognizant of them.
3. The fact that a writ is addressed "to any lawful officer" of a specified county, instead of "any sheriff of the State of Alabama," is matter of abatement only, and not available on error.
4. From the time the original process is served, until the final judgment, the parties are presumed to be in court, and need no further notice of the orders there taken in reference to the case.

5. The motion docket is a book of the court required by law to be kept by the clerk, and the entries in it may be looked to as showing the orders taken by the court, and are sufficient evidence to authorize the rendition of judgment *nunc pro tunc*.

ERROR to the Circuit Court of Coffee.

The record does not show the name of the presiding judge.

On the 12th day of March, 1851, Broxson sued out a capias in assumpsit against Yonge, returnable to the Circuit Court of Coffee County, which was executed on the 18th day of the same month, and returned into the office of the clerk of said court.

On the 1st day of April, 1851, a copy of the original writ, accompanied by the affidavit of James Claxton, who deposes that he issued it by authority from the clerk, and that it had been destroyed by fire after its service on Yonge and return by the sheriff, and a notice signed by Buford & Pugh, attorneys for Broxson, that at the Spring term, 1851, of the Circuit Court of Coffee County, a motion would be made to that court for leave to substitute and establish such copy writ and endorsements, instead and in lieu of the original writ, which had been destroyed by fire, was executed on the 31st March, 1851, as appears by the sheriff's return.

In the record of the proceedings of the Spring term, 1851, of said Circuit Court, it appears that a motion was made in pursuance of said notice; and across the face of the motion, as written out by the attorneys, the word "granted" is written in the hand-writing of the presiding judge. At the same term, it appears, a declaration was filed; but no entry on the minutes allowing the substitution of the papers was made at this term.

The next entry in the record does not show at what term it was made, but recites the motion made at the Spring term, 1851, and that it had been granted; and that by omission of the clerk no entry thereof had been made on the minutes of that term, and that record evidence of that fact was exhibited to the court; that the plaintiff moved that said entry, allowing the substitution of the writ and returns, be entered *nunc pro tunc*. Then follows an order in form, *nunc pro tunc*, in pursuance of the motion.

The next entry is dated as of the Spring term, 1852, and is a judgment by default.

To reverse this judgment the case is brought to this court by writ of error, and it is here assigned for error:

1. That the court below had no jurisdiction to render the judgment against the plaintiff in error, because no valid process had been served upon him, and no sufficient legal notice had been given him.

2. The court below erred in its order allowing the substitution of the writ and return thereon.

3. The court erred in making each order in the case.

4. The court erred in not entering judgment of discontinuance, and not striking the case from the docket, there having been no action of the court on the supposed notice at the Spring term, 1851.

Belser & Rice, for plaintiff in error:

1. Where the judgment is by default, although there may be a declaration, yet, if there is no valid writ, the judgment will be reversed. The jurisdiction of the court does not exist to render a judgment by default, unless there is a valid writ and valid service of such valid writ.—Murray v. Tardy, 19 Ala. R. 710; Welch v. Walker, 4 Por. R. 120; Oneal v. Garrett, 3 Ala. R. 276.

2. The pretended writ in this case, is wholly insufficient to give the court jurisdiction, for the following reasons: I. It is not issued by the clerk of the court, or by the deputy clerk "in the absence of the principal," but was issued by one James Claxton.—Clay's Dig. 334 § 123; Clay's Dig. 146 § 19; Stone v. Harris, Minor's R. 32. II. It is not "returnable to the first day of the term," nor to any regular term, but is returnable to "the next Circuit Court to be held for Coffee County," which would include a special court as well as a regular term. And no writ can be made returnable to a special court.—Clay's Dig. 334 § 123. III. He does not mention "the place of holding" the court.—Wragg v. Bank, 8 Porter's R. 195. IV. It is not directed to "any sheriff of the State of Alabama," but to "any lawful officer of Coffee County." The direction is an essential part of the writ, and the direction here conferred no authority on the sheriff.—Clay's Dig. 336 § 132; Gresham v. Leverett, 10 Ala. R. 384.

3. The pretended notice to substitute was wholly insufficient

to authorize the court to act, for the following reasons: I. It is "process," and being issued "while the court was sitting" at its Spring term, 1851, "or within five days before the beginning" of that term, it should have been made returnable to "the term next after that," to-wit: the Fall term, 1851.—Clay's Dig. 334 § 126. II. It showed a void writ, and therefore might be disregarded. III. It was not issued until one day after its pretended service. IV. It does not call on plaintiff in error "to show cause why said pretended copy writ should not be substituted, but merely says said Broxson will make a certain motion. It is essential to such notice, that it should in substance notify the defendant that the motion will be made, and call on him to show cause why the motion should not be granted. V. It is essential to such notice, that it should name some particular day of the term when the motion will be made, but it may add, "or as soon thereafter" &c., (that is, after the day specified.) The notice here is too general and indefinite. It names no day when the motion will be made, but says, "at the Spring term, 1851, or as soon thereafter," &c., (that is, after the Spring term, 1851.) If such a notice is good as to a term of one week's duration, it is good as to a term of four week's duration. Such a notice, is a nullity.—Armstrong v. Robertson, 2 Ala. R. 164; 10 U. S. Dig. 213 § 66; Shehan v. Hampton, 8 Ala. R. 942; Murray v. Tardy, 19 Ala. R. 710 (which explains Wilkenson v. Branham, 5 Ala. R. 608, relied on for defendant in error.)

4. The entry *nunc pro tunc* is a nullity, or reversible. It does not appear to have been made before the judgment by default. And as this is a matter which goes to the jurisdiction—as the court had no jurisdiction after judgment by default to make the entry *nunc pro tunc*, without notice to plaintiff in error, this court will not intend or presume any thing which does not appear of record.—Murray v. Tardy, 19 Ala. R. 710.

5. The proceeding under the notice was discontinued by the failure to have an entry made at the Spring term, 1851, and the failure to show when the judgment *nunc pro tunc* was granted—whether before or since the judgment by default.—Armstrong v. Robertson, 2 Ala. R.; Drinkard v. The State, 20 Ala. R.

6. Each order and judgment, is either a nullity or reversible

for error. The remarks and commentaries of the clerk in making out the transcript cannot be regarded, but will be treated as no part of the record; for instance, the clerk remarks, "and on the original notice, with the above affidavit and copy writ annexed, is endorsed the following return." Again; "and across the face of the entry last above is written, in the hand writing of the judge presiding at the said Spring term, the word 'granted.'" All such commentaries of the clerk are extra-official, gratuitous and unauthorized, and cannot be looked to. Plaintiff in error moves to strike them out.—Carroll v. Pathkiller, 3 Por. R. 279.

J. Buford, *contra:*

1. As to the alleged inconsistency, that the notice of substitution is dated April 1, and executed the day before: It is a mere clerical error in post-dating the notice, and is amendable in this court at costs of plaintiff in error.—Wade v. Kelly, 2 Stewart 443; Grant v. Pettybone, *ib.* 445; Moody v. Keenan, 9 Porter 252.

2. Declaration was allowed to be substituted, after judgment, without notice, in Wilkinson v. Branham, 5 Ala. 608. Other cases of substitution are to be found in 8 Porter 303; 9 *ib.* 252, 493.

3. The notice is sufficient.—McLendon v. Jones, 8 Ala. 298.

LIGON, J.—The exceptions taken to the proceedings in this case, may be classed under two heads: first, objections to the original writ; and second, objections to the action of the court in allowing the substitution, and rendering the judgment by default.

As to the writ it is urged, first, that it was not issued by the clerk of the court out of which it purports to come; secondly, that it is not returnable to the first day of any regular term; thirdly, that it does not name the place at which the court will be held; and, fourthly, that it is not directed "to any sheriff of the State of Alabama."

As to the first of these objections, it is sufficiently answered by the face of the writ itself, and the affidavit of Claxton attached to the copy proposed to be substituted. The former is subscribed with the name of the clerk, and the latter establish-

es the fact that this name was subscribed to it by the affiant, who had authority to do so. He must be taken to have been a deputy of the clerk.

The second and third objections are also untenable. It is true, the writ is not, in so many words, returnable to the first day of any term of the court, but it reads "before the next Circuit Court to be held for Coffee County." When a process is made returnable to the next term of the court after its issue, it must be held to mean the first day of such term, and the term mentioned to be the first regular term of the court succeeding its date, if, as in this case, it was issued more than five days before the session of a regular term.

The law appoints the time when the several Circuit Courts in this State shall hold their sessions, as well as the places at which they must be held; and requires that all writs of *capias ad respondendum* shall be returned into the clerk's office of the court from which it issues, on the first day of the term to which it is returnable. It is not necessary that the day or Monday of the month, or even the month itself, when the court is to be held, should appear by the writ; nor is it important that the town, village, or place at which the court holds its sessions should be inserted in it. Suitors are presumed to know these things, without being advised of them by the process of the court.—Clay's Dig. 334 §§122, 123; *ib.* 336 §§132, 133.

The fact that the writ is addressed "to any lawful officer of Coffee County," and not "to any sheriff of the State of Alabama," is not available on error, as it is at most only matter in abatement, of which the party did not seek to avail himself in the court below. The notice and motion for leave to substitute the writ are regular, and meet all the requirements of our previous decisions.—McClendon v. Jones, 8 Ala. 298. Indeed, no notice was necessary, as the case was *in fieri* when the original writ was destroyed.—Ganaway v. The State, at the present term.

It is, therefore, unnecessary to consider further the objection taken by the plaintiff in error to the service of the notice by the sheriff. From the time the process is served, until the final judgment, the parties are presumed to be in court, and need no further notice of the orders there taken in reference to the case.

It is further urged, that, if the notice and motion to substitute were regular, the motion was discontinued by the failure of the plaintiff to take any steps in relation to it at the Spring term, 1851, of the Circuit Court of Coffee County. This objection is not sustained by the record; for by this it appears, that at that term the motion to substitute was entered on the motion docket of the court, and granted; but the clerk failed to enter it on his minutes. It also appears that a declaration was filed at the same term. The motion docket is a book of the court required by law to be kept by the clerk, and the entries and proceedings appearing upon it as of a particular term may properly be looked to, as showing the orders taken by the court, in relation to the case at that term, and to show that there was no discontinuance. They are, also, sufficient evidence of what was done at a previous term, to authorize the court to enter a judgment *nunc pro tunc* at a subsequent one, if they show that the court had ordered a particular judgment, which the clerk omitted to enter.

Our conclusion is, that the judgment of the Circuit Court is regular, and must be affirmed.

BONEY ET AL. *vs.* HOLLINGSWORTH ET AL.

1. Courts of equity grant relief against conveyances obtained by misrepresentation or mistake; and if the parties occupy a relation from which an unusual degree of confidence, affection or sense of duty naturally springs, the utmost degree of good faith is required from the party in whom the trust is reposed, and he must show that his contract is in every respect just, fair and equitable.
2. A father executed a deed conveying certain lands to his sons, but filed it away among his papers, and never delivered it; after his death the grantees obtained a voluntary relinquishment from their sister of all her interest in the lands, by representing to her that their father on his death bed had declared it to be his intention that they should have them: The relinquishment was set aside in equity, because the grantees failed to show that they stated fully and fairly their father's dying declarations.

ERROR to the Chancery Court of Sumpter.

Heard before the Hon. J. W. LESESNE.

The defendants in error were the complainants below, and the bill was filed by them as the heirs of Kitty J. Hollingsworth, who was a daughter of Winbeck Boney, against the plaintiffs in error, who are the other heirs of said Winbeck.

The charges are, in substance, that the defendants, Wm. G. and R. C. Boney, after the death of the said Winbeck, their father, the said Wm. G. being the administrator of the estate, fraudulently to procure the lands of which he died seized, caused a deed of relinquishment of the same to be prepared, and by false representations procured it to be signed by several of the heirs, and that it bears the name of the said Kitty J., who at its date was in life and a widow; that she never signed it; that it was a fraudulent contrivance of said defendants to get the lands; that they got her to visit them and signed her name to it, and taking advantage of her ignorance of business and confidence in them, her brothers induced her to go before a justice of the peace and acknowledge it as her deed, and that there was no consideration for the same; that the false representations made by the said W. G. and R. C. Boney to obtain said deed of relinquishment, were representations made to the heirs that the said Winbeck had in his life-time, and many years before his death, conveyed said lands to them in fee; that the said Winbeck never made such deed, or, if such was found amongst his papers, that it was never perfected or expected to operate as a deed or executory devise; that to prevent accounting for said lands in the way of advancement, the said Wm. G. and R. C. Boney fraudulently induced the Orphans' Court to enter into the final decree, that the heirs consented in writing the advancements received by them should not be discounted; that said defendants fraudulently put the name of Kitty J. to said agreement, and that she had received no advancement.

The prayer is, that the deed of relinquishment be declared void; that the complainants have set apart to them their portion of the lands, and that an account of the rents and profits of the same since they have been in possession of said defendants, be taken; that they be decreed to pay the complainants their proportion of the same, and for general relief.

The answers of Wm. G. and R. C. Boney are substantially the same, and allege that said Winbeck did sign and seal a deed to them for the said lands, aud caused it to be witnessed as

signed, sealed and delivered; and that he rested from that time in the confident expectation that said deed (though not formally delivered but remaining in his hands filed with other like deeds to the other heirs) would operate to convey said lands to said defendants, at least at his death, and subject only to dower if his wife should survive him, and that it had been so understood in the family; that said Winbeck spoke of said lands as for his sons, the said defendants, and stated his reasons for giving them a larger share of his property to be, because they had helped him much; that in the last illness of the said Winbeck, upon being admonished by his physician to make a disposition of his worldly matters, referring to the deed for the lands and to other deeds made to some of the other heirs for negroes, which were lying with the deed for the lands, he said, in effect, "that he had made deeds of gift; that they were bunglingly done, but that he thought they would be effectual, and that for the residue of his property, not embraced in said deeds and not given off, the law would divide it as well or better than he could;" that it was the wish and expectation of the said Winbeck, from the making of said deed, and his dying wish and expectation, that his sons should have and own said lands after him, subject only to the dower, and that his belief was that said deed was and would be effectual to secure the accomplishment of such wish; that he had been guided in his life-time by such expectations, in giving off negroes and other property to the other heirs, most of which deeds were retained by him, as was the deed of the lands; and that he had given off and advanced to each of his other children negroes and other property, which he designed as an advancement to them, and to the said Kitty J. among the rest. The charge of false or fraudulent representations is denied, and it is insisted, that they made no other representations in relation to said deed than was consistent with the fact, that said Winbeck signed and sealed said deed, and retained it among his papers, and had intended and declared that the same would be effectual to convey and secure said lands at his death subject only to dower; that there was no fraud in obtaining the deed of relinquishment from the other heirs; that the same was given for the purpose of effectuating the wishes of their father, and upon the mutual agreement of the heirs with each other to carry out the intent of their deceased father as to the property de-

signed to be given off, notwithstanding any legal defects in the gifts or conveyances, so that each, the said Kitty among the rest, should retain what had been given off to each; that the written consent not to discount the advancements referred to in the bill, was given and signed by the distributees whose names appear to the same except the said Kitty J.; that her name was signed by the said R. C. Boney as her agent, upon her verbal authority; that the name of the said Kitty J., although not written by her to said deed of relinquishment, was knowingly and freely ratified and confirmed by her, without any fraud or imposition practiced upon her; that said Kitty J. had received, by way of advancement, a negro girl, who has since had children, and which she retains under the agreement.

The material portions of the evidence are stated in the opinion of the court.

The Chancellor, on the hearing, set aside the deed as to Mrs. Hollingsworth, and decreed that the complainants, as her heirs at law, be invested with such interest as they would have taken by descent; that an account of the rents be taken, &c. The decree of the Chancellor is assigned for error in this court.

Jonathan Bliss, for plaintiffs in error:

1. The answers deny explicitly the fraud, imposition and abuse of confidence charged in the bill, and are responsive to the bill in this respect, and not controlled by the proof. They allege that the father did make such a deed as represented; that he designed it to take effect, at least, at his death; that he did not change his purpose, but continued in it until his death. Parker proves the execution of the deed, the purpose of the grantor to make it, his subsequent reference to it as effective and "sufficient;"' and Jones' testimony authorizes the conclusion to which he came, that the grantor sanctioned it again just before his death.

2. There are not wanting authorities to show that the deed might well be regarded as effective.—1 Johns. Ch. R. 329; 5 *ib.* 224; 5 B. & C. 671; 2 Greenleaf's Cruise, note 1, under pages 42–3, title 32, ch. 2, § 64.

3. But if there was ignorance or misapprehension, it was common to both parties, and to all the heirs. Ignorance of fact or law, if the fact or law be doubtful, if common to both par-

ties, will not vitiate a compromise, especially in case of family arrangements.—Neale v. Neale, 1 Keen (15 En. Ch. R.) 672; 2 Atk. 587; 5 W. & S. 111; 6 Watts 48; 5 Peters 99; 2 Rand. 442.

4. The answers deny the exercise of improper influence in the procurement of the release. But in cases of family arrangements, where the effect is to promote concord, the stringency of the rule as to influence seems at least relaxed. Were it not so, perhaps plausible grounds might always be found for overturning such arrangements; certainly so, if the fact of the relation is to be made evidence of the influence. Yet it is between such parties, and to uphold such arrangements, that the courts go farthest.—1 Vesey Jr. 19; 2 Eden 175; 7 Clarke & Fin. 318; 2 Th. 425; 2 Leading Cases in Eq., Part 2, 249, 250 to 266.

5. The compromise in this case was by deed acknowledged, and it cannot be set aside, unless on grounds of mistake or fraud clearly made out.—6 Munford 406; Thomas v. Roberts, 2 Bibb 343; 1 Watts 216; 6 Watts 421; 1 W. & S. 425; 8 *ib.* 31; 2 Paige 278; 3 Dana 5. The facts, in reference to the deed from the father and his intent, were before the grantor, and she joined in giving effect to that intention with a knowledge of the supposed defect in the deed from the father; otherwise, there could have been no occasion for any aid from a release.

6. The execution of a release of one party, is a sufficient consideration for a promise or release by the other, even if the supposed right released is invalid.—11 Conn. 12; 17 *ib.* 511; 11 Verm. 483; 4 Met. 270.

R. H. Smith, *contra:*

If one, in ignorance of his right to an estate, release it, or if his right be concealed from him, the release will be set aside on the ground of mistake.—1 Story's Eq. § 130, and note. So, if the parties are not mutually ignorant, a court of chancery will never hold them bound; they must act with full knowledge of all the doubts and difficulties that do arise. Transactions are not to be treated as binding, even as family arrangements, when the doubts existing, as to the rights alleged to be compromised, are not presented to the party interested.—*Ib.* § 131. And these principles are of peculiar force, when mutual trust and

confidence are reposed between the parties. In such cases, the law requires the utmost degree of good faith in all transactions. *Ib.* § § 217, 218. If it is not employed, the transaction is a fraud, an actual fraud. Confidence and affection are not to be repaid by hard bargains; and an administrator, with title deeds in his possession, and the confidence of a sister in his word, is not to make advantages of her. In such cases, courts of equity go much beyond the doctrine applicable to mistakes and actual fraud.—*Ib.* § 307. If confidence is reposed, it must be faithfully acted upon, and preserved from any intermixture of imposition. If influence is acquired, it must be kept free from the taint of selfish interests, and cunning and over-reaching bargains. If means of personal control are given, they must always be restrained to purposes of good faith and personal good.

In such cases, courts of equity do sit to enforce a technical morality.—*Ib.* 308. The court, acting in aid of general morals, will grant relief in all cases where confidence is reposed and abused.—*Ib.* § § 122, 123, 124 125, 128, 321, 323, and notes; 72 Law Library, pp. 73, 255, 256, 257; Leonard v. Leonard, 2 Ball & B. 171; Maddeford v. Austwick, 1 Simon 89. The unreasonableness of the transaction itself implies fraud.—1 Story's Eq. § 128.

2. The facts do not leave the fraud to inference, and do not leave the case to stand on the doctrines of mistake or implied fraud, but plainly establish a fraud. There was no family settlement. The sons took all, and gave nothing. They knew the deed was not good, as a deed, nor intended to take effect as such, and their answer shows it; nor was it as a will. They had it in possession; Mrs. Hollingsworth was on a visit to the paternal mansion, in the midst of sorrow, when any representation that her deceased father intended or wished the act, would be of improper and controlling influence. The time, the occasion, were not only unsuited to such a transaction, but their selection is proof of the advantage sought. The representation made was false, as is well shown by the Chancellor's decree; the execution of the deed in Mrs. Hollingsworth's name shows a double fraud: first, to commit Mrs. Hollingsworth to their signing her name to the deed of release; second, to use her assent as an influence on the others. That it was a pre-conceived plan, is shown by the conference with Dr. Jones, the prepara-

tion of the papers, and then the relinquishment to the land, and then the pretended agreement about hotch-pot, for which defendants do not pretend to show the semblance of an authority. The answers were evidently drawn to create the impression that the other children had been advanced in slaves, and that plaintiffs in error had not; but it turns out that the sons had been advanced, each of a slave of greater value than the slave given to each daughter. This evasion is, of itself, sufficient to throw doubt on the answers.

As to the delivery of the deed, the answers themselves admit there was no delivery, and Parker, the subscribing witness, proves there was none, and the conduct of Wimbeck Boney, in reference to the estate, proves that he did not intend to pass the estate by deed. His remarks to Dr. Jones were no act of delivery; they were merely a reference to what he had done, and not an act perfecting the deed. They were the mere expression of opinion as to the validity of the act; and it is evident his idea was that the deed would do to pass the estate after his death, probably not knowing that a will of real estate required three witnesses. Delivery is an act necessary to the perfection of a deed. It is conceded that a delivery may be good, though not made to the grantee. It may be to another for him, or it may be by some other act, such as placing the deed on a table, &c. And it is conceded that, when the act of delivery is once done, the immediate taking possession of the deed, and retention by the grantor, will not prevent its operation; but if every case cited by plaintiffs in error be examined, it will appear that there was an act of delivery, although very loose language is employed by some of the judges in these cases.—2 Green. Ev. 297; Frisbie v. McCarty, 1 S. & P. 61, 64; 14 Ala. 131; 12 *ib.* 739; Moon v. Collins, 4 Dev. 384.

But suppose the deed was delivered, and of full effect. The consequence would be, that plaintiffs in error would have been thereby advanced, and they would have been constrained under our statute to have brought the value of the lands into hotch-pot, or received no further portion of their father's estate; and they say in their answers that, when the deeds were made, the land was worth more than when they answered. Dr. Jones' deposition shows, that decedent intended equality among his children. He wished his sons to have the land probably, but

"the law would do the balance"; and the law would equalize by the doctrine of hotch-pot, and there is nothing better known by the people at large, than the law of advancements and hotch-pot.

The representation made by plaintiffs in error to procure the release, &c., was, that the father said, "as to the residue of his property, not embraced in said deeds and not given off, the law would divide it," &c.; and afterwards the answers say plaintiffs in error made no other representations than as above set forth. The representation made was not only different, but the reverse of what decedent did say. The particularity with which they represented the decedent as speaking of the residue of his property, shows how cautiously they were guarding against the effect of an advancement, and shows that they were probably dealing with their sisters under advice of counsel.—Fraudulent representations were made, to prevent accounting for the value of the lands as an advancement; and Mrs. Hollingsworth's name was signed to the pretended agreement, and no authority whatever is shown for doing it.

Plaintiffs in error insist that the deed of their father was good, and upon that idea got the release. If so, they must account for the value of the lands as an advancement. The bill is framed to meet either aspect of the case; there is a general prayer. One or other of the grounds must prevail. The father's was a deed, or it was not. If it was, we recover under the law of hotch-pot; if it was not, the relinquishment was fraudulently obtained. Upon either ground, the decree accomplishes precisely the same thing.

GOLDTHWAITE, J.—The object of the bill is, to set aside a deed of relinquishment made by Kitty J. Hollingsworth to Wm. G. and R. C. Boney. This application is based upon allegations of fraud, consisting of false representations of material facts, and abuse of confidence reposed by Mrs. Hollingsworth in the grantees, who were her brothers.

It certainly requires no citation of authority to show that, if the deed which it was the object of the bill to annul was obtained by the false representations of the other party, and by false representations we mean those made with an intent to deceive, a court of equity would not hesitate to set it aside; and the power of that court to grant relief is equally clear, where

an innocent misrepresentation is made by one party through mistake of a material fact, constituting an inducement to the act of the other party, and in relation to a matter in which such party may fairly be presumed to trust to the representation of the other. If there is just reason to believe that the act has been done upon the faith of the representation, and that the party has been misled by it to his prejudice, however honestly the statement may have been made, it affords just ground for the interposition of chancery.—Story's Eq. § § 192, 193.

The ground upon which equity interferes in the last case, is, that the misrepresentation has operated to deceive, and it is therefore regarded as constructive fraud; but we apprehend the jurisdiction in such cases might more properly rest on the ground of mistake.

There is also another, and a very comprehensive class of cases, in which equity looks to the peculiar situation which the parties occupy towards each other, and if one occupies a relation from which an unusual degree of confidence, affection, or sense of duty naturally springs, the utmost degree (*uberrima fides*) is demanded.—Story's Eq. § 218; and when this relation does exist, says Judge Story, courts of equity, acting upon this superinduced ground, in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance; for it is founded in a breach of confidence.—Story's Eq. § 308. If there is any misrepresentation of a material fact, or any just suspicion of artifice or undue influence, courts of equity will interpose and pronounce the transaction void, and as far as possible restore the parties to their original rights.—Story's Eq. § 218.

Again; it is well settled, that, where the relations of attorney and client, guardian and ward, principal and agent, exist, the duty devolves upon the party in whom the trust is reposed, of showing that the contract is in every respect just, fair and equitable; and the principle which we think deducible from the authorities, applies to all cases from which peculiar confidence or influence naturally results; and where he who takes the gift, or makes the bargain, occupies this relation towards the other party, it lies upon him to prove his bargain, or, in other words, that he has dealt with the other party with the utmost good

faith, taking no advantage of his influence, but representing everything fairly.—Hunter v. Atkins, 3 M. & K. 113; McCormick v. Malin, 5 Black. 509. Applying these principles to the case before us, there is no difficulty in arriving at a correct conclusion.

Winbeck Boney, who was the father of Mrs. Hollingsworth, and of Wm. G. and R. C. Boney, who were his only sons, some years before his death caused to be prepared a deed conveying to his sons in fee, in consideration of love and affection, the land which he then owned, and of which he subsequently died in possession. To this deed he signs his name, affixes his seal, and causes it to be witnessed as signed, sealed and delivered; but instead of actually delivering it, he files it away amongst his papers, where it is found after his death. When dying, he is advised by his physician of the necessity of making a final disposition of his worldly affairs. He replies, "that he had made some deeds of gift; they were bunglingly done, but he reckoned they would answer, and the law would do the rest." After his death Wm. G. Boney administers upon his estate; a deed of relinquishment to the lands is prepared, to which the name of Mrs. Hollingsworth, who is a widow residing in the State of Louisiana, is signed by R. C. Boney, who resides in the same State; and subsequently, when Mrs. H. is on a visit to Alabama, she ratifies the same before a justice of the peace. It is not pretended that she received any pecuniary or valuable consideration, but it is conceded by the answers of both Wm. G. and R. C. Boney, that the deed was made by her for the purpose of carrying out the wishes of her deceased father, so that the sons should receive the lands absolutely and subject only to the dower of the widow of Winbeck Boney. The answers are silent as to any advancements received by the brothers in the life-time of the deceased, but the evidence shows, that while Mrs. H. had received in that way a negro girl, the sons had each received a negro boy.

These are the material facts, and it is too clear for argument, that whatever may have been the intention of Winbeck Boney, in relation to the lands, his sons could take nothing under an instrument which had no validity as a deed for want of delivery, and none as a will for want of the necessary number of witnesses. They can claim under the deed of relinquishment alone; and

taking into consideration the position they occupy towards Mrs. Hollingsworth, we think that proof of the mere execution or ratification of the deed, so far as she is concerned, is not sufficient to sustain it. Until some inducement is shown, the law must always regard with suspicion an act by which a sister divests herself of a valuable interest in favor of a brother. There may be no fraud; everything may be honest and fair; but until the act is satisfactorily accounted for, the inference of fraud, artifice or abuse of confidence, is so strong, that we think equity should always relieve against it.

In the present case, the ties of affection and confidence resulting from the near relation of the parties, it is reasonable to suppose, were drawn closer by the recent bereavement common to both, and by the fact that the sister was a widow. Unless, therefore, a sufficient inducement is shown, the deed must be set aside as to Mrs. Hollingsworth.

How stands the case in this aspect? The answers of the brothers allege, that it was the intention of the father that they should have the lands at his death absolutely, subject only to the claim of the widow for dower; and if this was the case, and Mrs. H., for the purpose of carrying out the wishes of her deceased parent, without any artifice or abuse of confidence on the part of her brothers, thought proper to relinquish to them her interest in the lands, most certainly the deed must be supported.

But this is not the case made by the record. The language used by Winbeck Boney on his death-bed, as detailed by Dr Jones, the witness for the defendants below, is very different from the words which the answer alleges were spoken on that occasion. The expressions, as given by the witness, certainly leave it very doubtful as to what were the intentions of Winbeck Boney, as regards the disposition of the lands; and they should have been stated to Mrs. Hollingsworth as they were, so that she might resolve the doubt for herself. But instead of this, the answers create the impression on our mind that such representations were made, as would leave no doubt whatever on her mind, that the wishes of her father were as alleged in the answers.

Under these circumstances, the deed ought not to be sustained, and the decree of the Chancellor is affirmed; the defendants, W. G. and R. C. Boney, to be taxed with the costs of this court.

POOL'S EXECUTOR *vs.* RELFE ET AL.

1. To remove the bar of the statute of limitations after it is complete, the admission must extend not only to the correctness of the original debt, but also to a present willingness or liability to pay it.
2. A proposal by way of compromise to pay the principal, if the creditor would lose the interest, is not sufficient to remove the bar of the statute after it is complete.
3. A letter containing an offer of compromise held not to be a conditional promise such as would become binding and remove the bar of the statute on proof of the facts denied in it.

APPEAL from the Chancery Court of Lowndes.

Heard before the Hon. J. W. LESESNE.

THIS bill was filed by David H. Kenyon, as executor of Solomon Pool, deceased, against the appellees, who are alleged to be the brothers and sisters of William T. Relfe, deceased, and as such his heirs at law. It alleges that said Pool became surety of said William T. Relfe on a guardian's bond; that said Relfe afterwards made default as guardian, and a judgment was recovered on said bond against the obligors for the sum of $327 68; that complainant, as executor of said Pool, had been compelled to pay said judgment; and that the defendants had received out of the estate of said Wm. T. Relfe, their brother, more than enough to repay it.

The answers admit the case made by the bill, and rely upon the statute of limitations as a defence. To remove the bar of the statute the plaintiff replied a subsequent promise, and adduced in evidence a letter from Montgomery S. Relfe, one of the defendants, the material portions of which are stated in the opinion of the court. The Chancellor held the letter not sufficient to remove the bar of the statute, and dismissed the bill; and his decree is now assigned for error.

I. B. STONE, for appellant:

1. The Chancellor misconceived the true force and meaning of the letter. It is not a mere peace offering, or proposition to compromise: it is predicated of existing facts, and therefore

admissible in evidence; it is a distinct admission of the correctness of the demand, and an offer to pay it.—20 Johns. 576; 2 Phil. Ev. 221, 222; 1 Green. Ev. § 192; 22 E. C. L. R. 355, 447; 14 Ala. 476; 20 *ib.* 105, 147.

2. The letter amounts to a conditional promise to pay; and as the proof shows that the event has happened upon which the promise depends, to-wit: that the writer has received property from his brother's estate sufficient to pay it, the promise becomes absolute, and plaintiff is entitled to recover.—Angell on Lim. 249 to 254.

Geo. W. Stone, *contra:*

1. The complainant's claim is barred by the statute of limitations.—Hatfield v. Montgomery, 2 Porter 58; Johnson v. Johnson, 5 Ala. 99; Juzan v. Toulmin, 9 Ala. 663; Wood v. Wood, 3 Ala. 762; Lansing v. Starr, 2 Johns. Ch. 150; Demarest v. Wynkoop, 3 Johns. Ch. 136; 10 Wheaton 176; 6 Johns. Ch. 289.

2. The letter contains no promise or admission of a debt sufficient to take the case out of the statute; it is but an offer to compromise.—Allen v. Roberts, 2 Bibb 99; Gibbs v. Wright, 14 Ala. 465; Angell on Limitations 227 to 245, and authorities there collated.

PHELAN, J.—The case made by the bill is admitted in effect by the answer, and the defence is rested upon the statute of limitations. To this defence the complainant replies a subsequent promise, and relies upon the contents of a letter written by the defendant, Montgomery S. Relfe. This narrows the whole controversy down to a question as to the true import and construction of the terms of this letter.

We do not understand the appellant to controvert the correctness of the rule now generally adopted, and which this court has laid down in the recent cases of Townes & Noce v. Fergusson, 20 Ala. 147, and Ross v. Ross, *ib.* 106, that an admission to remove the bar of the statute of limitations, where the bar is complete, must not only extend to the correctness of the original debt, but also to a present willingness or liability to pay it; but he insists, that the letter of the appellee properly construed amounts to this.

Let us then come to the consideration of this letter. We may observe at the outset, that it was written after this bill was filed, and while the suit was in progress.

In this letter Relfe says to the complainant, speaking of an offer he had made through the attorney of the latter: "I offered to pay you the money that your father's estate had to pay for my brother William, without interest, for this reason: that my brother's estate was insolvent—neither my brother nor myself received one dollar from it, &c. Therefore, I thought it would be equitable for us to divide the loss." * * "I have consulted able attorneys about the matter, and it is against their advice that I offer to make the compromise. They say that it is uncertain whether I am bound for the debt or not, but I do not want you to lose anything by my brother's estate; therefore I make you the offer of $328, that you actually paid out. If you will compromise, I will pay you $328 on the first day of January next, bearing interest from the time that your attorney informed me that he had the business in hand. I hope that you will accede to my proposition."

To this letter he adds a *postscript*, saying: "I would not have insisted on your losing the interest, had not my brother's estate been insolvent;" repeats that his attorneys had advised him not to compromise, "but for reasons already stated I propose to do so. I hope you will accede to my proposition."—

* * "Your terms of settlement we cannot accept. If I had any of my brother's property in hand, and was not already a loser by the estate, I would not expect you to lose the interest."

It is argued, that here is a distinct admission that the sum of $328 was paid by Pool for Relfe's intestate, and that, although this was accompanied with a proposition to compromise, this cannot prevent it from being held to be an admission of the truth of that fact, as the statement of it as a fact was in no wise essential to the proposition to compromise; that it was gratuitously made, and ought to be received as proof of the admitted fact, whether the proposal to compromise be accepted or not. Concede this to be so, and what does it amount to? It simply amounts to an admission on the part of Relfe that Pool did pay for his intestate the $328, as charged in the bill, many years ago. But this is no more than an admission of the correctness of the original debt or demand, and this will not suffice to remove

the bar of the statute. One thing more is necessary, and that is the admission of a willingness, or of an existing liability to pay that debt, and such an idea, instead of finding support in the terms of that letter, is plainly excluded and repelled by them.

The letter, in few words, amounts to this: "I admit that you paid for my brother the $328, as you allege in your bill, many years ago, in North Carolina. It is not equitable that you should lose both debt and interest. I will divide the loss with you, and if you will lose the interest, I will pay the principal; and I make this offer expressly by way of *compromise*, for my attorneys have advised me that I can probably defeat your suit altogether."

If such a proposal as this can be construed to amount to the admission of the debt of $328 as an existing debt, or of a willingness to pay that sum as a debt carrying of course as such the interest which had accrued upon it from the time when it was first due, then it would be difficult to frame a proposal for a *compromise*, admitting the original justness of plaintiff's demand at all, which would not involve also such an admission as would remove the bar of the statute. But it will not bear any such construction. An offer to pay $328, in full satisfaction of that sum and 9 or 10 years interest upon it, is a very different thing from an admission that the debt and interest are both due, and that the party is willing to pay both. The offer is a plain and distinct one; and any construction that would carry its effect beyond what is plainly intended, would work injustice, and greatly discourage offers of compromise. The offer was to pay the $328 in full satisfaction of the claim. This the appellant thought proper to decline, and pursue his supposed rights by due course of law, and he must take the consequence.

Nor is there any ground furnished by this letter upon which to argue that the offer to pay is a conditional one, which becomes binding when it is shown that the respondent had received property from his brother's estate. The statement that he had received none may be shown to be false, and yet not alter the nature of his proposal. He makes that the pretence or reason why he does not offer more. But the extent and nature of the offer, and not his pretence or reason for making it, must govern the extent and nature of his liability.

The Chancellor very properly decided that the replication of a subsequent promise to the plea of the statute of limitations, was not supported by this letter, and dismissed the bill.

The decree below is affirmed.

FURLOW'S ADM'R *vs.* MERRELL.

1. When a paper is appended to the answer to an interrogatory, and the interrogatory itself is not set out in the record, the Appellate Court will presume, against the plaintiff in error, that the answer was responsive to the interrogatory; and plaintiff in error being thus held to have called for the production of the paper, he cannot object to its having been read in evidence by defendant.
2. A testator bequeathed a slave to one of his daughters, by her maiden name, "*entirely* for her and her children," and gave others specific legacies of slaves with incumbrances on them: *Held*, that the word "entirely" did not exclude the marital rights of the husband, but had reference only to the quantity of the estate which the legatee took as compared with the others; that, if she was unmarried at the time the will took effect, she took a life estate only, with remainder to her children; but if she was then married and had children, she took an absolute estate jointly with them.
3. In detinue by the husband's administrator, after the death of the wife, for a slave bequeathed to her by her maiden name, "entirely for her and her children," the will was construed to give her a life estate only if she was unmarried when the will took effect, but an absolute estate jointly with her children if she was then married and had any; and the record contained no evidence that she was then married: *Held*, that, construing the bill of exceptions most strongly against the plaintiff in error, it would be presumed that she was then unmarried.

ERROR to the Circuit Court of Macon.

Tried before the Hon. ROBERT DOUGHERTY.

DETINUE by the plaintiff in error, as administrator of John Furlow, deceased, for a slave named Sam.

On the trial a bill of exceptions was allowed, by which the following facts appear: The plaintiff proved that his intestate, John Furlow, had possession of the slave in controversy for several years in the State of Georgia, to-wit: from about 1832 up to the time of his death in 1840 or 1841, and that the property,

with other slaves then went into the possession of his wife, Cynthia Furlow, and continued therein while she resided in Georgia, and until after her removal to Alabama in 1843, after which she mortgaged the negro Sam to the defendant; that subsequent to the decease of said Cynthia Furlow, a bill was filed in behalf of her administrator, against the defendant, Merrell, praying the sale of said negro to satisfy said debt, and that the balance be paid to such administrator; that a decree was made to that effect, and a sale made at which the defendant became the purchaser.

The defendant gave in evidence the will of George M. Hill, the father of the said Cynthia Hill, in which is found this clause: "I give to my daughter, Cynthia Hill, one negro girl, named Ann, together with all her increase, entirely for my daughter's benefit and her children;" and then offered evidence showing that the slave in question was the son of the said negro girl Ann.

The defendant offered in evidence the fifth interrogatory propounded to a witness named A. Bartlett and the answer thereto. The plaintiff objected to this evidence, "on the ground that the answer was not responsive to the question, and because the same was illegal and irrelevant, the question being as to a will of George M. Hill, and the answer as to a will of George M. Hill; but which objections were overruled, and the defendant excepted." The interrogatory and answer are as follows: "Please look upon the paper shown to you, purporting to be a copy of the will of the said George M. Hill, and state, if you were present when said will was executed, who executed the same? at what time? and who were the subscribing witnesses to said will? Please examine the said will, and state if the woman Ann therein bequeathed is the same Ann about whom you have been testifying? How long had the said John Furlow and Cynthia Furlow, *alias* Cynthia Hill, been living together before said will was executed? Why was said woman Ann bequeathed to said Cynthia by the name of Cynthia Hill, instead of Cynthia Furlow? How many children did the said Cynthia have at that time, and what were their names? Were they called by the name of Furlow or Hill?"

"Witness says he has looked upon the paper shown him purporting to be a copy of the will of George Hill; was present

when the will was made; it was written by Charles A. Dennis. Hill made his will with the expectation of going to the Indian war, in Gen. Floyd's army; Wm. Ingram and witness were witnesses to the will; does not remember that there was any other witness thereto; the woman Ann named in the will is the woman about whom I have testified above; does not remember now whether Furlow was married to his wife Cynthia at the time the will was made, but thinks he was."

"In support of the objection, and before the decision of the court thereon, the plaintiff offered and read to the court the answer to the fourth cross interrogatory to the same witness, as follows: "Witness says that he is about eighty four years old; cannot see to read without the aid of spectacles, but with it can read to my own satisfaction; with the aid of glasses witness can read plain writing; witness admits that he has not read the paper purporting to be a copy of George Hill's will, but recollects, upon hearing it read, that it is the will of George Hill; witness further states that Wm. B. Carter has just read over the paper purporting to be a copy of the will of George Hill; witness states further that he recollects distinctly to have been acquainted with George M. Hill, was present when he died, and that he is the man about whom he has been testifying, and about whom inquiry has been so often made in these interrogatories, evincing that the witness did not speak of the will a copy of which is here set out." (Here follows a copy of the will signed by George Hill, and attested by Sally E. P. Ingram, Thomas Ingram and witness.)

The first bequest contained in the will is to his daughter Cynthia, and has already been stated. The will then proceeds, as follows:

"2nd. I give and bequeath unto my daughter, Ruth Molsey, one negro girl named Betsey and all her increase.

"3rd. I give and bequeath unto my son, Manning D. Hill, fifty dollars.

"4th. I give and bequeath to my grand-son, John M. Hill, son of Manning D. Hill, one negro girl Chany, her first child to be the property of Mary Hill, daughter of Manning D. Hill, and all the rest of her (Chany's) increase to be the property of the above named John M. Hill; which negro girl is to be for the use of Manning D. Hill his life-time, but at his death to be di-

rectly given up to John M. Hill and considered his property.

"5th. I give and bequeath to my grand-daughter, Minerva Hill, one negro girl Cresa, with all her increase, to the said Minerva Hill and heirs.

"6th. I give and bequeath the first issue of my negro woman, Suckey, from this day to Martha Lyon Hill, daughter of Manning D. Hill.

"7th. My negro woman, Suckey, is to be kept by my wife, Mary Hill, during her life-time, together with all and singular the residue of my negroes and all my personal property, and I do hereby make and ordain, &c."

This will is dated the 5th day of October, 1813, and purports to have been proved the 6th day of June, 1814.

The bill of exceptions goes on as follows:

"The plaintiff waived the necessity of the certificate of the judge to the alleged copy will annexed, and admitted that W. B. Carter was the proper ordinary; upon which the defendant offered to read in evidence the annexed paper purporting to be a copy of the will of George Hill, which annexed paper was attached to the deposition of Allen Bartlett, with the certificates and endorsements thereon. To the reading of which, severally and collectively, the plaintiff objected, and stated the ground of his objection: 1st, that it did not purport to be the will of George M. Hill inquired after; 2nd, because of the uncertainty of the proof as to the identity of the will and of the testator, the will deposed to being attested by only two witnesses and that offered in evidence was attested by three; 3rd, because there was no sufficient evidence of probate, or of the same having been probated, that there was no such evidence offered as would authorize the reading of said paper as a will, no letters testamentary or of administration with the will annexed; and 4th, because the bequest was to Cynthia Hill, when there was no such person in existence, her rights being merged in her husband, John Furlow: but which objections were severally overruled by the court, and the said paper and endorsements and certificates read in evidence; to all of which the plaintiff severally excepted."

Upon this state of proof, the court charged the jury, that the will gave a separate estate to Cynthia Furlow, *alias* Cynthia

Hill, and excluded the marital rights of the husband; and that no such estate vested in John Furlow as would authorize his administrator to recover, and they must find for the defendant; to which charge the plaintiff excepted.

The errors here assigned are: 1st, the admission of the testimony objected to by the plaintiff in error; and 2nd, the charge of the court as given to the jury.

Geo. W. Gunn, for plaintiff in error:

1. The effect of marriage at common law is, to merge the separate existence of the wife into that of the husband, which operates an absolute gift to him of the personal chattels of the wife which were in her possession at the time of the marriage, and who takes the same interest in personal chattels which come into his wife's possession during the coverture, whether the same be by gift, bequest or otherwise.—Clancy on Husband and Wife 2, 3.

2. The language employed does not create a separate estate in the wife, nor even attempt it; and it will be found that the uniform tenor of the decisions of this court is, that in order to exclude the marital rights of the husband, the language must be such as to show a clear and manifest intention to create a separate estate in the wife.—8 Por. 73; 2 Ala. 152; 6 Ala. 418; 7 Ala. 589; 8 Ala. 345. The decisions cited further held, that it is an inseparable incident to the creation of a separate estate in the wife, that the husband has no control or dominion over the property, and that his interest must be excluded by direct words, or a manifest intent; and in many of the cases it is said, that, notwithstanding the conveyance be made to trustees for the use of the wife, and no estate or interest be in terms given to or vested in the husband by the deed, yet his control or dominion over the property is not necessarily excluded.—12 Ala. 46.

3. Under this will, the gift took effect upon the death of Geo. Hill, the testator. The property then vested in Cynthia Hill; and if she was then, or soon thereafter became the wife of plaintiff's intestate, his marital rights attached; and the limitation over, (if indeed it may be so called) in favor of the residuary legatees, is void, because repugnant to the gift, which vested in the husband of the legatee an absolute power to dispose

of the property. At common law, there was no remainder of a chattel, but every gift or bequest, for any period however short, vested the absolute property.—See 2 Kent's Com. 352; 5 Johns. Ch. 334; 10 Johns. R. 12.

4. A distinction, however, was introduced at an early period, between the bequest of the use of a chattel and the thing itself; and the rule of the common law was so far changed, that the use only of a chattel might be given to one, and a remainder over to another.—2 Kent's Com. 352.

5. Courts of equity, availing themselves of this distinction, have in modern times supported limitations of personal property, when confined to the period allowed by law, in all cases where the terms of the bequest were such as to admit of the construction that the use only was only intended to pass.—2 Kent's Com. 352, 353 and 354.

6. But when the terms of the bequest are such as clearly vest in the first taker the legal title or right of property, the rule of the common law is still applicable, and renders void every subsequent limitation.

7. Nor is it in such cases necessary, in order to avoid the future limitation, that the power of disposition should be given to or exercised by the first taker; but it is sufficient, if the terms of the bequest are such as, by their necessary legal effect, vest in the husband the right of property, from which the power of disposition of chattels is inseparable. In this case, there is no limit to the estate of the first taker, and he could have exercised the power of disposition at any time; and a purchaser from him could have acquired an indefeasible title. And I insist, according to a correct construction of the will, that it was at the option of the husband of Cynthia Hill, whether that benefit for the daughter and her children, as expressed in the will, was to be realized from the use and employment of the property, or from a sale and the use of the proceeds arising therefrom.

8. The terms employed vested the property in the husband of Cynthia Hill upon the marriage; and had the testator desired to have prevented the marital rights of the husband from attaching, he could have done so by interposing trustees, or by the creation of a separate estate in the daughter. But I insist that the limitation over is inconsistent with the absolute interest

which plaintiff's intestate acquired in the property. See the following authorities in support of the positions assumed :—Allen v. White, 16 Ala. 181; Davis v. Flinn, 18 Ala. 132; Brewster v. Bull, 10 Johns. 19; 16 *ib.* 537; Ide v. Ide, 5 Mass. 500; Patterson v. Ellis, 11 Wendell 276; 22 Wendell 137; Jones v. Callach, 8 Ves. 38; 1 *ib.* 268; Story's Equity Jurisp. vol. 2 § 1069 and note 2.

9. That the court erred as assumed by the first and second assignment, see Armstrong v. Lea, 12 Wheat. 169; Tarver v. Tarver, 9 Peters; Shephard v. Nabors, 6 Ala. 637, and cases there cited, in which the doctrine is clearly announced, that the paper purporting to be a will could have only been admitted as evidence, by being first proven in a court having appropriate jurisdiction of such matters, or by being accompanied with letters testamentary or of administration.

The evidence upon which the same was admitted, was uncertain, contradictory and indefinite, and in the absence of proper evidence that the same had been probated in any court.—9 Wheat. 565, and Moore v. Lewis, 21 Ala. 580.

R. F. Ligon, *contra*, contended :

1. That the act of the court of Georgia, admitting to probate the will of George Hill, cannot be collaterally impeached, except for fraud or want of jurisdiction.—10 Bacon's Abr. 527; 10 U. S. Dig. 280 § § 58, 66; Lee v. Hamilton, 3 Ala. 529; Crawford v. Exr's of Simonton, 7 Por. 126; Baily v. Baily, 8 Ohio 239; Bothwell *et al.* v. Hamilton, adm'r, 8 Ala. 461, and cases there cited.

2. A decision on the probate of a will is a judicial proceeding, and the court in which it is registered is a court of record; and all courts in the United States take judicial notice that such tribunals are established in the several States.—Dozier v. Joice, 8 Port. 313; 7 Cranch R. 481; Balfour v. Chew, 5 Mart. Louis. R. 517.

3. Every court makes its own record, and the form and manner of such record cannot be examined into indirectly by another court.—11 U. S. Dig. 199 § 48; 10 *ib.* 197 § 58; 9 *ib.* 203 § 57; Regan v. McCormick, 4 Har. 435; Lee v. Gause, 2 Iredell 440.

4. When the subject matter is a judgment or probate of a

will, the presumption is, that these are every where matters of record; and it is the certificate of the judge which establishes the validity of the form pursued by the clerk, it makes no difference what this form is.—White v. Strother *et al.*, 11 Ala. 723.

5. The refusal of the Circuit Court to exclude the answer to the second and fifth interrogatories in A. Bartlett's testimony was correct, because it was a question of fact to be left to the jury.

6. The main question in the case is, the construction of that clause of George Hill's will which reads thus, "I give to my daughter Cynthia Hill a negro girl, named Ann, together with all her increase, *entirely* for my daughter's benefit and her children." We insist that, under this clause, the marital rights of the husband are excluded.—Brown v. Johnson, 17 Ala. 232; Williams' Adm'r v. Maull, 20 Ala. 726; Newman v. James & Newman, 12 Ala. 29.

7. In the case of an unmarried woman, much stronger terms are required to indicate the intention of the donor or testator to create a separate estate, than in that of a married woman.—The proof shows that Cynthia Hill was married.

8. The limitation over in favor of the children is not void; it is neither too remote nor inconsistent with the gift to the mother; Cynthia Hill and her children either take a joint interest under the will, or she has an estate for life with a resulting trust in favor of her children. The general rule of law is, if a devise be to one and his children, and he has children at the death of the testator, the parent and children take jointly under the will.—Nimmo v. Stewart, 21 Ala. 690.

GIBBONS, J.—The court, in our opinion, committed no error in permitting the answer to the fifth interrogatory set out in the bill of exceptions to be read to the jury. The objections were, that this answer "was not responsive to the interrogatory, and because the same was illegal and irrelevant, the question being as to the will of George M. Hill, and the answer being as to a will of George M. Hill." It will be seen, when this answer is compared with the interrogatory, that it is for the most part directly responsive thereto. Nor can we see how the testimony was illegal or irrelevant. It is true, the will, when produced, purports to have been signed by George Hill, whereas

the interrogatory is as to a will of George M. Hill. In the answer to this interrogatory, as well as in answer to the fourth cross-interrogatory, also set out in the bill of exceptions, the witness seems to speak indifferently sometimes of George Hill and sometimes of George M. Hill, but, as explained in the answer to the fourth cross-interrogatory, always meaning the same person, viz., the father of Cynthia Hill, *alias* Cynthia Furlow. If there was any doubt as to the competency of the answer to the fifth direct interrogatory standing by itself, that doubt, in our opinion, is entirely dispelled by the answer to the fourth cross-interrogatory; and this was introduced by the plaintiff below, in order to show the answer to the fifth direct interrogatory inadmissible. The effect, in our opinion, is the very reverse of what was intended by the party introducing it, as the witness therein explains that, in speaking of a will made by George Hill or George M. Hill, he is all the while speaking of the same person, and of him who made the will.

The defendant offered in evidence a paper purporting to be a copy of the will of George Hill. The bill of exceptions states, that the "plaintiff waived the necessity of the certificate of the judge to the alleged copy will annexed, and admitted that W. B. Carter was the proper ordinary." This copy will was appended to the answer of the fourth cross-interrogatory above referred to, which was offered by the plaintiff in evidence to the court, to show the incompetency of the answer to the fifth direct interrogatory. The language of the bill of exceptions is, "which annexed paper was attached to the deposition of Allen Bartlett, with the certificates and endorsements thereon." The copy set out in the bill of exceptions has no certificate attached to it, and the only endorsement which we observe is as follows: "Proven in open court, this 6th June, 1814, Coleman Pendleton, C. C." The objections to the introduction of this paper were: "that it did not purport to be the will of George M. Hill inquired after; 2nd, because of the uncertainty of the proof, as to the identity of the will and of the testator, the will deposed to being attested by only two witnesses, and that offered in evidence was attested by three; 3rd, because there was no sufficient evidence of probate or of the same having been probated, that there was no such evidence offered as would

authorize the reading of said paper as a will, no evidence of letters testamentary or of administration with the will annexed; and 4th, because the bequest was to Cynthia Hill, when there was no such person in existence, as her rights were merged in her husband, John Furlow." These several objections we shall not take the trouble to examine minutely in detail, as the circumstances under which they are made relieve us from that necessity. According to a well established rule of this court, the bill of exceptions will be taken most strongly against the party excepting, and every reasonable and legitimate intendment will be made in favor of the decision of the court below. As above remarked, the above mentioned copy of the will comes appended to the fourth cross-interrogatory of the plaintiff below, whilst the interrogatory itself is not set out. It is clear, if the plaintiff had called upon this witness to append a copy of the will to his answer to the fourth cross-interrogatory, he would thereby be estopped from objecting to it as evidence in the cause; having himself called for it, if the other party wishes it it must be read to the jury.—*Vide* Edgar v. McCarn, at the present term. In the absence of the interrogatory propounded to the witness, we think it but fair to presume that the answer was responsive to the matter inquired of, and that the witness did that only which he was requested to do. If this is not the fact, and the plaintiff wished to rebut this legal presumption, he should have set out the interrogatory with the answer, in order that we might see whether the copy of the will was called for by it or not. There was, therefore, no error in permitting this copy of the will to be read to the jury at the instance of the defendant in the court below.

Independent, however, of these considerations, we do not consider the objections well taken, as the three first raise the question, whether the will was in fact the one under which the defendant claimed title. This was a question of fact to be decided by the jury, and the plaintiff had the right to have the attention of the jury directed to this inquiry, by asking the appropriate charges, if he had thought proper. The fourth objection we could not sustain, if for no other reason than the fact that we are entirely unable to gather from the bill of exceptions whether Cynthia Hill was married or not when the will was made. This objection assumes such to be the fact; but

the bill of exceptions does not, in our opinion, warrant the assumption. The only testimony upon the subject set out in the bill of exceptions is the answer of Bardlett to the fifth direct interrogatory, in which he says, "he does not remember now whether Furlow was married to his wife Cynthia at the time the will was made, but he thinks he was." But, if Furlow was married at the time the will was made, we apprehend his wife Cynthia would not loose a bequest, which happened to be made to her by her maiden name, if it was clear that she was the person intended as the legatee by the testator.

The only remaining question is as to the charge of the court, and this raises the question as to what estate the said Cynthia Furlow, *alias* Cynthia Hill, took in the bequest made to her in the will. The words are: "I give to my daughter, Cynthia Hill, one negro girl, named Ann, together with all her increase, entirely for my daughter and her children." The court charged the jury, that the above bequest gave to Cynthia Hill, *alias* Cynthia Furlow, "a separate estate, and excluded the marital rights of the husband; and that no such estate vested in John Furlow as would authorize his administrator to recover, and they must find for the defendant." As above remarked, we are entirely unable to gather from the present record whether the legatee, Cynthia Hill, was married or not at the time the will was made, nor does it appear whether or not there were any children at the time that the testator died. These facts are, in our opinion, essential in order to determine, with any thing like precision, the rights that accrued to the legatee under the will at the time that the bequest took effect. Both the counsel in the cause, and the court, seem to have taken it for granted that the legatee was married at the time the will was made; but the only proof upon that subject which the record contains leaves the matter entirely in doubt. The words of the bequest, as we construe them, would under ordinary circumstances be sufficient to create a separate estate, if the legatee was married at the time the will was made, but not otherwise. But these words, when considered in reference to the whole will, we do not consider as indicative of any thing appertaining to the rights of her husband, if she then had one, or of one which she might have. It will be recollected that the testator has given negro women to other legatees with incumbrances upon them; as for

instance, to John M. Hill is given one negro woman, with a proviso that her first child should be the property of Mary Hill, the sister of the legatee, but a life-estate in the same negro is reserved to the father, Manning D. Hill; one other negro is bequeathed in a similar manner. Our conclusion, therefore, is, that the words "entirely for my daughter's benefit and her children," relate not to the marital rights of the husband of the legatee, but to the quantity of the estate which the legatee was to take, as compared with some of the other legatees in the will who took incumbered legacies. The court below probably based its charge upon the idea that the words above mentioned, as employed in the will, were used with the intention of excluding the marital rights of the husband of the legatee; but such, from a careful examination of the whole will, is not our conclusion.

Admit, for the present, that the court misconstrued the language of the bequest, in supposing that it created a separate estate in the legatee, upon which the marital rights of the husband could not attach; it yet remains to be seen whether there was any error in the charge of the court of which the plaintiff in error can complain. As above remarked, it does not appear from the present record whether the legatee was married or not, neither does it appear whether she had any children at the time the legacy took effect. This latter fact, as we construe the words of the bequest, is absolutely essential to be known, in order to determine with any accuracy the estate which Cynthia Hill took in the bequest. If she was then unmarried, the words of the bequest would, in our opinion, create a life-estate simply in Cynthia Hill, with remainder over to her children; but if she was married and had children at the time that the will took effect, then she would take absolutely a joint estate with the children.—Nimmo v. Stewart, 21 Ala. 682. In the latter case, then, Mrs. Furlow would have an interest to which the marital rights of the husband would attach, and that interest would pass to his representatives; but in the former case, Cynthia Hill, *alias* Furlow, would take only a life-estate, with remainder, or rather a springing use, in favor of her children at her death. In the latter case, it is clear that the administrator of the husband could maintain no suit for the property after the life-estate of the wife had ceased by her death, as by that event

the right of the children in the property would become complete. The record being silent as to the facts relative to the *status* of the legatee at the time the bequest took effect, and also as to whether there were then any children, the same principle again arises already invoked in a former part of this opinion, viz., that the bill of exceptions is to be construed most strongly against the party excepting. In the absence of proof, therefore, we are bound to presume that Cynthia Hill was unmarried at the time the will was made and the bequest took effect, and that no children of the said Cynthia were then in existence. This is by no means a violent presumption, as she is called by her maiden name in the will, and it is but fair to conclude that, if she was then Mrs. Furlow, her father would have called her by that name in his will. Indeed this presumption is strengthened by the fact, that in the same will the testator makes another bequest to another of his daughters by the name of her husband. Assuming then the fact to be that the legatee was unmarried at the time that the bequest took effect, and she being proved to have died before this action was brought, it is manifest that the plaintiff, as administrator of Furlow, could not recover the property, and the instruction of the court to the jury, that they must find for the defendant, was right, although a wrong reason was assigned for it.

Our conclusion is, that there is no error in the record of which the plaintiff in error can complain, and the judgment of the court below is consequently affirmed.

BIRD *vs.* WOOLEY, USE, &c.

1. When suit is brought on a note in the name of the payee for the use of another person, if the defendant does not by plea deny its execution, the note itself imports a consideration, and this presumption is not repelled by showing that the payee "never was the owner of the note, and never put it in circulation or authorized it to be done."

ERROR to the Circuit Court of Talladega.

Tried before the Hon. EZEKIEL PICKENS.

Assumpsit by Andrew Wooley, for the use of Jacob P. House, against Isaac Bird, the plaintiff in error, on the following note:

"$400. Four months after date we jointly and severally promise to pay Andrew Wooley, or bearer, four hundred dollars, for value received, this day of May, 1843.

(Signed) Isaac Bird."

It appears by bill of exceptions, that the plaintiff read this note, and closed. The defendant then proved by Andrew Wooley, the plaintiff in the action, that he was applied to by Jacob P. House, (the person for whose use the suit is brought,) to borrow money, and that he obtained it on a mortgage executed on property at the time of the loan, but that this transaction was long before this note became due, say nine or ten years before the trial, which was had the 5th November, 1851. He further testified, "that he never was the owner of the note sued on in this action, in any shape or form; that he never put it in circulation, nor authorized it to be done." Thereupon the defendant asked the court to charge the jury "that a note is only *prima facie* evidence of a consideration having passed between the maker and the payee, and that if they believed from the evidence that none passed between the plaintiff, Wooley, and Bird, that Wooloy never was the owner of the note sued on, and never put it in circulation nor authorized it to be done, then it cast the burthen of showing that the defendant received value for the note from the holder."

This charge the court refused to give, but charged the jury, that, if there was no consideration for that note as between the maker and the payee, yet the law presumed a consideration between the maker and the person to whom it may have been delivered.

The defendant excepted to the refusal of the court to give the charge prayed for by him, as also to the charge given, and he here assigns the same for error.

White & Parsons, for plaintiff in error:

1. This note is not payable in Bank, and therefore is governed by our statute. It is admitted that, in the hands of the payee, or of any one to whom he has transferred it, this note is, of itself, *prima facie* evidence "of the debt or duty for which it was

given."—Clay's Dig. 340 § 152. But this is as far as that statute goes. Whenever it is shown, as it was in this case, that the note sued on "never was owned by Wooley, in any shape or form; that he never put it in circulation, nor authorized it to be done," then, we insist, the person for whose use the suit is brought must show himself a holder under such circumstances as will authorize him to recover notwithstanding these facts.—Wallace v. Br. Bk. Mobile, 1 Ala. 569, and cases cited; Brewer v. Holley, 13 Ala. 533; Brown v. Tabor, 5 Wend. 566. The charge which was asked and refused, simply affirms this proposition, and should have been given.

2. The charge given is abstract. The record sets out all the proof offered by plaintiff, viz., the note. When it was shown this note had never been in the possession of the payee, nor put in circulation by him in any way, then the law could not presume a consideration paid, nor a delivery of the note to any one, *without proof.*

J. J. Woodward, *contra:*

The defendant having failed to plead *non est factum*, he cannot deny the execution of the note.—Clay's Dig. 340 § 152. The execution consists of the making and delivery of the note to somebody. This is a legal conclusion which defendant is estopped by the statute from denying. The proof, therefore, that the note was not executed to Wooley, leaves the inevitable legal conclusion that it was executed in the name of Wooley, either to the usee or to some one through whom he obtained it. Then the question arises: Does not a note drawn payable to Wooley, and delivered to House, the usee, or some one through whom he obtained it, import a consideration? There can be no doubt that it does, either by the common law or the statute above referred to. Neither confines the principle, that a note imports a consideration, to the case where the note is delivered to the nominal payee.

To allow the plaintiff in error to assume from the proof that the note was delivered to some one without consideration, to be delivered to Wooley, from whom the consideration was to come, and upon this hypothesis to ask the charge which he did, would be to allow him to deny indirectly the execution of the note without the plea of *non est factum*; because the note, until de-

livered to Wooley, or some *bona fide* holder, would not be a binding legal liability upon Bird, in other words, had not been made and delivered. And to infer, from the fact that it was never delivered to Wooley, that it was never delivered for consideration as a binding promissory note to any other, is to deny the execution of the note. But if it was intended that the note should be negotiated to Wooley, the fact that it was not did not authorize the change asked.—5 Ala. 383; 4 Ala. 613.

CHILTON, C. J.—Wooley, the nominal plaintiff, is allowed to testify without objection, and we must regard his evidence the same as if made by any disinterested witness; his interest, which was waived, being against the party who examines him.

The question comes up, What is the legal effect of the facts to which he deposes? That the note sued on was signed and delivered by the defendant, is admitted by the pleading; for, under our statute, its execution could only be put in issue by a sworn plea, which has not been put in. Being sued for the use of House, the presumption is, that he has the beneficial interest in it; that he is the possessor of it, and that the same is in suit by his direction, he being responsible for the cost.

Now if the note was executed, that is, signed and delivered by Bird, the defendant, as a valid security, to House or any one else, and it came to his possession, an action lies in the name of the payee mentioned in the note, for the use of the party really entitled. It does not follow that, because the payee never owned or had possession of the note, and never put it in circulation, it is invalid, for the payor may have put it in circulation in this form, and, if he did not, he should have pleaded that fact in bar of the recovery. Failing to do so, and thus admitting its execution, the note as against him imports a consideration, and this presumption is not repelled by merely showing that the payee had no connection with it.

Bird made the note; and the manner in which it got into circulation, and the circumstances under which it was made, are presumed to be within his knowledge; and if he would avoid it, he, and not the holder, must take upon him the burthen of proof; must either deny its execution by him on oath, or, admitting its execution, must show that it was without consideration. In Thompson v. Armstrong, 5 Ala. R. 383, the point under con-

sideration appears to have been settled. In that case, the note was in the form prescribed by the Bank for discount; was payable to Andrew Armstrong, cashier, and was signed by the defendant and three others. The plaintiff proved the defendant's hand-writing to the note, and read the instrument to the jury, and closed his proof. The defendant then proved that the note had never been discounted at the Bank; that the Bank had not and never had any interest in the note, laid no claim to it, and had not authorized the suit. The defendant proved that Armstrong was cashier of the Bank when the note was made, and that it was in the usual form of notes discounted by the Bank. There was in that case, as in this, a total want of proof to show how the person for whose use the suit was brought had acquired the note. Under this state of facts, the question was raised by the request of the defendant for charges, whether the nominal plaintiff or beneficiary was not required to prove a consideration as passing from one or the other of them, and whether the facts did not tend to show that the note was fraudulently put in circulation. The court, however, held, substantially, that the facts in evidence did not cast the *onus* of proof of consideration on the plaintiff; that the note furnished *prima facie* evidence that the debt was due from the defendant, and also, that the facts did not warrant the court in referring it to the jury to ascertain whether the note was not put fraudulently into circulation.—This case is decisive of the one before us. In each, the payee, who never had the note, nor claimed any interest in it, is the plaintiff, for the use of a third party, who failed to show how he acquired an interest, and we are unable to distinguish between them. The fact that one is mercantile paper and the other is not, makes no difference, in the view in which we are considering the case, as in neither case was there an inducement.—See also The Planters' & Merchants' Bank v. Blair & Morroh, 4 Ala. Rep. 613.

There is no evidence in this case that the note was put in circulation by fraud, so as to require the holder to prove that he was a *bona fide* possessor; nor does the case fall within the influence of the cases of Wallace v. The Br. Bank, 1 Ala. 569, and Brewer & Holley v. Morgan, 13 Ala. 551. On the contrary, the proof, as we have said, is not inconsistent with a valid delivery of the note to House, who has it in possession, and in

whose hands it is evidence of a debt owing by the maker for the use of House, until the contrary is shown.

There was no error in the rulings of the court, and the judgment must be affirmed.

BROWN *vs.* MAYOR &c. OF MOBILE.

1. Proceedings for the recovery of fines or penalties for the violation of city ordinances, are *quasi* criminal in their character, and should be conducted according to the rules applicable to indictments for misdemeanors.
2. When defendant is charged with the violation of a city ordinance forbidding the trading with slaves without the permission of the owner or employer, and the statement does not aver the name of the slave or of his owner or employer, it is fatally defective on demurrer.
3. When the evidence before the jury, in a *quasi* criminal proceeding for the violation of a city ordinance, is entirely circumstantial, the court may refuse to charge upon a portion of the testimony, and should refer the whole of it to the jury.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. LYMAN GIBBONS.

THE plaintiff in error was proceeded against before the Mayor of Mobile, for a violation of an ordinance of the city forbidding the trading with slaves without permission from the master or other person having control of such slave, in writing or otherwise, first obtained.

He was found guilty, and fined by the Mayor $50; from which judgment he appealed to the Circuit Court. In that court the following statement was filed, (after setting out the parties in the margin:)

"Circuit Court of Mobile County, Fall Term, 1850.

"This case is brought to this court on appeal, on the part of the defendant, from the judgment of C. C. Langdon, Mayor of the City of Mobile, and *ex officio* justice of the peace in and for said county, in favor of the Mayor, Aldermen and Common Council of the City of Mobile, against the said defendant. The

said judgment was rendered on the 15th day of June, 1850, for the sum of fifty dollars, besides cost of suit, for violating the ordinance of the City of Mobile that provides, among other things, that it shall not be lawful for any person to buy, sell or receive from any slave or slaves any commodity of any kind or description whatever, without the consent of the owner or employer of such slave or slaves in writing expressing the articles so permitted, or unless the owner or employer of such slave or slaves shall personally authorize the same; and if any person or persons shall sell or receive from any slave or slaves, without such consent or permission, he, she or they so offending, upon conviction, shall be fined in the sum of fifty dollars. And the said plaintiffs aver, that the said defendant violated the said ordinance in this: that he sold, on the 1st day of June, 1850, in the City of Mobile in said county, to a slave by the name of , the property of , a certain quantity of spirituous liquors, without consent, permission or authority of the owner or employer of said slave first being had or obtained, contrary to said ordinance; and this suit is brought, and here prosecuted by the plaintiffs aforesaid, against the defendant, to recover the penalty of fifty dollars for violating said ordinance as stated."

The plaintiff in error demurred to this statement, and his demurrer was overruled by the court; whereupon he pleaded not guilty.

On the trial a bill of exceptions was taken, from which it appears that the plaintiffs below introduced two witnesses, who testified that they saw a negro, whom they knew to be a slave, enter the defendant's grocery in the night time, with an empty bottle in his hand, and the defendant, who was standing in or near the door as the negro entered, went into the house with the slave, from which they both presently came out, the negro with the same bottle nearly filled with spirituous liquors; they neither saw nor heard what was said or done in the house, nor did they know from whom the negro obtained the liquor; they saw no other person about the house; they were but a short distance from the house; it was situated within the corporate limits of the City of Mobile. This was all the evidence in the case, except the city ordinance under which the proceeding was had, which was read to the jury.

The defendant asked the court to charge the jury, that the fact of the negro's going into the defendant's store without, and coming out of it with spirituous liquors, as testified to by the witnesses, is not *prima facie* evidence against the defendant of having violated the ordinance. This charge the court refused, and charged the jury, that it was for them to determine from the evidence whether the defendant sold the liquor to the negro and thus violated the ordinance.

To the refusal to charge as asked, and to the charge given, the defendant excepted; and he here assigns the judgment of the court on the demurrer, and the matters of the bill of exceptions, as error.

C. W. Rapier, for plaintiff in error.

Daniel Chandler, *contra.*

LIGON, J.—Proceedings for the recovery of fines or penalties for the violation of ordinances, made for the government of cities or incorporated towns, are *quasi* criminal in their character, and as such should be conducted with greater regard to strictness than attaches to the pleadings in civil cases.

The recovery of the penalty is also a punishment of the offence against which the violated ordinance is aimed, and the prosecution should be so conducted, in respect to its pleadings, that the party proceeded against may know at once the charge brought against him and be enabled to meet it directly. If it be so general in its character, or so loose in its averments, as not to embody a distinct and substantive offence on which an issue could be understandingly made, and to which the accused could direct his proof without danger of misapprehending the accusation brought against him, he is not bound to answer it.

The rules applicable to indictments for misdemeanors, so far as certainty in averring the offence is concerned, may, we think, be applied with much propriety to cases of this kind, and would, perhaps, be the best and safest which could be adopted for their government. It will not do to leave them to be conducted under the loose and general rules which control appeals in civil cases. Whenever such proceedings are instituted, they imply the commission of a crime, and their end is the punishment of that crime. In this they are wholly dissimilar from the ordinary

appeals sent up by justices of the peace to the Circuit Courts of this State.

If these rules are applied to the case before us, we can be at no loss how to dispose of it. In the case of Francois v. The State, 20 Ala. 83, which was a prosecution for an offence against the laws of the State forbidding the trading with slaves without permission from the master, owner or overseer, the indictment charged the defendant with selling "to a slave, whose name is to the jurors unknown." This, it was held, was too general to authorize a judgment against the defendant after his conviction by the jury, and such an indictment it was declared would be bad on demurrer, the court remarking: "The rule is well settled, not only that the facts and circumstances which make up the offence must be stated in the indictment, but they must be stated with such certainty and precision, that the defendant may be enabled to judge whether they constitute the offence charged or not, that he may demur or plead accordingly; in order that he may prepare his defence, may plead a former acquittal or conviction, and that there may be no doubt as to the judgment to be given."

Judged by these rules, is the statement in this case sufficient to put the accused upon his defence to the merits? It is charged that the defendant below violated the ordinance of the City of Mobile against trading with slaves, by selling spirituous liquors to a slave, without averring either the name, or owner, or employer of the slave with whom he dealt. This ordinance is substantially the same with the statute of the State upon the same subject, except as to the punishment. Against a charge thus generally and indefinitely made, it would be difficult for the accused to prepare his defence. He may have the permission of the masters or employers of a hundred slaves to trade with them, and the slave with whom he is charged with unlawfully trading may be one of these; but which of them, it is impossible for him to know from the pleadings in the case. This permission may have been verbally given, and he cannot tell which of the owners or employers to summon in his defence; he must either summon all, or submit to an unjust recovery. And if he dare to bring in all, he is subject to be taxed with the costs of every one except two, and thus be compelled to pay out more than the amount of the fine imposed by the ordinance, in the at-

tempt to make out his defence; and this, when he is wholly innocent of the offence imputed to him.

Our opinion is, that the statement is not sufficiently certain in describing the offence, on account of the commission of which the plaintiffs below become entitled to recover the penalty sued for, and consequently the demurrer to that statement should have been sustained.

The charge requested by the defendant in the court below, was properly refused. The testimony before the jury as to the defendant's selling the spirituous liquors to the slave, was, in a high degree, circumstantial in its character, requiring to be weighed before its force could be rightly ascertained, and it is the peculiar province of the jury to do this. The correct course in such cases is, to refer the whole testimony to the jury, that they may say how far it goes to make out the plaintiff's case, and render their verdict accordingly. This is what was done by the court below, and its action in this respect is free from error.

For the error of the court in overruling the demurrer, the judgment must be reversed, and the cause remanded.

KREBS *vs.* O'GRADY.

1. When the husband has abjured the State, and his wife has acted as a *feme sole*, she will be so regarded; but to constitute an abjuration by him, there must be an abandonment of the wife and a removal from the State without the intention of returning.
2. The wife may, however, act as her husband's agent during his absence from the State, and as such, with his assent express or implied, may transfer a note which she has taken payable to herself.
3. The husband having gone to California, his wife continued to carry on his business, (a bakery,) and sold a part of the furniture and fixtures, taking notes payable to herself, which she afterwards transferred: *Held*, that these circumstances did not amount to presumptive evidence of her authority to transfer the notes, but the jury must decide whether they were sufficient to establish it.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. LYMAN GIBBONS.

THE plaintiff in error sued out an attachment against John McGinnis, and summoned John C. Morton as garnishee. Morton answered, denying any indebtedness to the defendant in attachment, and stating that he had executed three promissory notes to the wife of the defendant, which had been transferred to O'Grady, the defendant in error. O'Grady was thereupon summoned as transferree, and an issue was made up between him and the plaintiff in attachment to try the right of said notes.

On the trial it was proved, that the notes in question were given by the garnishee for the fixtures, counters, pans, &c., of a bakery belonging to a bake shop, which had been occupied as such by the defendant in attachment, who had removed to California some four months before the notes were given; that the property for which the notes were given was in the bake shop when occupied by such defendant in attachment, and that at the time the purchase was made, and for a long time thereafter, the wife carried on the same business at that place, dealt and traded on her own account, and in her own name; that the notes in question were payable to her, and endorsed by her to the defendant in error before the summons of garnishment was served, in payment of a debt which she had contracted with him while trading on her own account, for supplies necessary to carry on the business; that the defendant in attachment had never returned from California, and there was no evidence offered to show that he had, during his absence, assisted his wife in any way.

The court charged the jury, that, although a promise to the wife during coverture was in law a promise to the husband, yet this rule was subject to modifications; that in case of abandonment by the husband, when the wife is acting as *feme sole*, she may take a note payable to herself, and endorse it in her own name and pass a title, where there was no proof that the husband dissented from it; so, where the husband and wife were living separately, and she was trading and doing business in her own name, with the effects of the husband, or her own effects, her contracts would be valid and binding if the husband assented, and his assent would be presumed, unless he expressed his dissent; that as to the effects of the husband, the law in such a case would make the wife his agent, and she would be presumed to act within the scope of her powers until he dissented; that

if the jury believed the defendant in attachment had abandoned his wife without any intention of returning, or, if he went to California without such abandonment, or with the intention of returning to her, or sending for her, and that she carried on business in her own name uniformly, and that she so dealt with the garnishee when she took the notes from him—when she endorsed them to the defendant in error, and when she contracted the debt to pay which the notes were endorsed to him, and if such debt was a *bona fide* debt, and the transaction was without fraud, then the title to O'Grady was good, and would override the title of the plaintiff in attachment, as it was prior in point of time.

The charges thus given were excepted to, and are here assigned for error.

C. W. Rapier, for plaintiff in error:

The notes, being made payable to a married woman, became instantly the property of her husband, and her endorsement would transfer no property in them.—Barlow v. Bishop, 1 East 432; Savage v. King, 17 Maine 301; Commonwealth, v. Manley, 12 Pick. 176; Miller v. Delamater, 12 Wend. 435; Story on Promissory Notes, 129 § 124; Vance v. Wells & Co., 6 Ala. 737.

More especially did the property in the notes vest in the husband, since the consideration for them was the property of the husband.—Commonwealth v. Manley, 12 Pick. 176; Keith v. Woombell, 8 Pick. 211.

This case is very different from that of Roland v. Logan, 18 Ala. 307. In that case the wife had been abandoned by her husband and left to her own shifts. She had removed with her children from Georgia to Alabama, where she had conducted business on her own account for three years prior to the endorsement of the note in question, and near ten years before the institution of the suit. Her husband had never come to Alabama, and had asserted no claim to her earnings. In the case at bar, the record furnishes no indication of an abandonment by the husband of his wife. In Roland's case, the wife contracted in reference to means and property acquired by her own industry. In this case, the wife contracted in reference to the property of her husband.

The decision in Roland's case turns upon the presumption of the husband's assent to the wife's transaction, and that presumption is founded upon the fact of abandonment. So, the reason of that case can apply with no force to this.

If the circumstances in this case would have warranted the inference of the husband's assent to the wife's transaction, that inference should have been left for the jury, and not have been drawn by the court.—Roland v. Logan, 18 Ala. 307; Barlow v. Bishop, 1 East 432.

The court below charged the jury that the wife's agency under the circumstances would be presumed, and that her acts as such would be valid, unless the husband dissented. The rule is, that the wife, whether the husband is abroad or at home, is not presumed to be his agent generally, or to be entrusted with any other authority as to his affairs, than that which it is usual and customary to confer upon the wife.—Benjamin v. Benjamin, 15 Conn. 347.

The instructions of the court below to the jury were argumentative, indirect and uncertain, and were of a character to mislead the jury.—Cothran v. Moore, 1 Ala. 423; Kenan v. Holloway, 16 *ib.* 53.

The charge given to the jury last set forth in the bill of exceptions, assumes facts which it is the province of the jury to ascertain, and virtually directs a verdict for the claimant upon the facts so assumed.—9 Ala. 937; 14 *ib.* 460; 16 *ib.* 398.

Percy Walker and Geo. N. Stewart, *contra:*

1. The charges of the court below, as to the validity of the assignment of the notes, correctly state the law, and are in conformity with the decisions of this court in the case of Roland v. Logan, 18 Ala. 307, and authorities there cited. The ancient rule imposing disabilities on *femes covert*, has been greatly relaxed, and many exceptions to the rule have been allowed.—The case at bar is within the exceptions.

2. Where a husband leaves his wife in the possession of property, she is, during his absence, necessarily his agent, and the husband is bound by her acts.—10 Wend. 79; 16 Verm. 653; 1 Peters 108. A husband may abjure the realm, so as to confer on his wife the character of a *feme sole*, and whether he left his wife with the intention of not returning is a question for the

jury.—9 Ala. 857; 3 *ib*. 557; 4 McCord 148. A wife may sell, and convey personal property as the agent of the husband; and whether she was so authorized is for the jury to decide from the facts and circumstances.—3 Strobh. 315; 8 Black. 240.—Any evidence tending to prove such agency is admissible.—11 Verm. 628. The authority of the husband will be presumed.—4 Dev. & Batt. 180; 12 Wend. 433; 18 Ala. 307.

The cases cited by plaintiff in error will be found, upon examination, not to affect the one at bar. That of Barlow v. Bishop, 1 East 432, cannot be considered as authority, inasmuch as the English courts have since decided differently.—7 Bing. 565; 1 Campbell 485. In the case in 12 Pick. 173, there was no express assent of the husband, nor was there evidence from which such assent could be implied. No analogy exists between the case at bar and that of Savage v. King, 17 Me. 301. There was nothing in the circumstances of that case to take it out of the operation of the general rule, that a note made payable to the wife is a note to the husband and becomes, *eo instanti*, his property. There is as little analogy in the case of Benjamin v. Benjamin, 15 Conn. 347. There there was direct proof not only that the husband left home for a merely temporary purpose, but that he made ample provisions for the support of his family, and that she was not only not his general agent, but that she was not in any manner to act for him. There was no room for presumption of agency. It is not denied in that case, that the "wife may act as agent of her husband," or that her agency may be presumed; see page 357. In the case of Rotch v. Miles, 2 Conn. 638, which in some respects is similar to the case at bar, the court held, that if a man leave his wife, without making provision for her support, and did not return, and she continued in the business in which she was left, the husband will be liable for her contracts, and the law will presume his assent to her acts. See opinion of Chief Justice Swift.—This case was cited and approved in Benjamin v. Benjamin, 15 Conn. 347. The case from 7 Wend. 68, was essentially different from the one at bar, and the subsequent case of Miller v. Delamater, 12 Wend. 433, is an authority in favor of the defendant in error. In that case the Supreme Court of New York review the case of Barlow v. Bishop, 1 East, and dissent to the judgment there given. The case cited from 3 Humph.

80, is merely an affirmance of the general rule, and has no correspondence to the case at bar.

The charge of the court below to the jury, "that if they believed the facts deposed to by the witnesses, and that there was no fraud in the transaction between O'Grady and Mrs. McGinnis, the claimant, O'Grady, was entitled to a verdict," was not erroneous. The testimony was clear and without conflict, and it was only necessary to draw a legal conclusion from it; thus bringing it within the ruling of the court in Abney, adm'r, v. Pickett, 21 Ala. 739, and Hopkins v. Scott, 20 *ib.* 179.

GOLDTHWAITE, J.—That a note payable to the wife is, in legal effect, a note payable to the husband, and as a necessary consequence can be transferred by his act alone, is, as a general proposition, well settled. There are, however, exceptions to this rule, and cases may exist in which the wife is authorized to take notes as if a single woman; and in such case, it follows that the title would pass by her endorsement. According to the later English decisions, this can only happen when the husband is civilly dead, or his absence is involuntary, as when he is an alien enemy.—8 Term 547; 2 B. & P. 226; Begget v. Frier, 11 East 301; Barden v. Keverberg, 2 Mees. & W. 61; 2 Roper H. & W. 121. In this court we have held, that where the husband has abjured the State, and the wife has acted as a *feme sole*, she will be so regarded.—Arthur v. Broadnax, 3 Ala. 557; James v. Stewart, 9 Ala. 355. The question, however, as to what constitutes an abjuration of the State, so as to take the wife out of the disabilities of coverture, has not been settled with precision. We all, however, agree that there can be no abjuration in this sense, without an abandonment of the wife, and a removal from the State without an intention of returning.—Mead v. Hughes, 15 Ala. 140.

The wife may, however, act as the agent of her husband; and a note payable to her, although in legal effect it is payable to him, may be endorsed by her in her own name; and if done with the assent of the husband, the endorsee acquires a valid title. And this assent is not required to be expressly proved, but may be inferred from circumstances. Such was the decision of this court in Roland v. Logan, 18 Ala. 307, and under the influence of this principle, if a wife was living separate

from her husband, and doing business in her own name, with his knowledge, her contracts, within the scope of that business, would be valid and binding, unless the husband dissented. His assent would in such a case be presumed. If the character of the business was such, as naturally to include the sale or disposition of the husband's effects, the same principle would apply; but where such disposition was not within the legitimate scope of the separate business, most certainly no presumption of law could be created, and the jury would not be authorized to presume the husband's assent to the disposition, unless their minds were fairly brought to that conclusion by the facts before them in evidence.

The wife, in the absence of the husband, may have a general authority to exercise the usual and ordinary control over the property left in her possession by him, which must be controlled by some one; unless the presumption of this authority is rebutted by proof that he had constituted some other person his agent for that purpose.—Church v. Landers, 10 Wend. 79.—But the sale of the husband's effects may be outside of the usual and ordinary control of them; and whether it is so or not must depend upon the nature of the property, the length of the absence, and perhaps other circumstances. If the husband went to California, leaving the wife to carry on his plantation during his absence, it would not follow, as a presumption of law, that he had given her authority to sell and dispose of his slaves, and transfer the notes received in payment for them. So, in the present case, although the husband may have consented that his wife might carry on the business of the bakery in her separate name, that fact does not create a legal presumption that she was authorized to transfer the notes received from the sale of the fixtures, which in law were payable to her husband; and that they were transferred in payment of a debt contracted by her in the course of the separate business, can have no influence. The question is purely one of authority, so far as she is concerned; and all we decide on this branch of the case is, that the circumstances we have stated did not amount to presumptive evidence that she had authority from the husband to transfer the notes in question. It was for the jury to say whether this evidence would fairly bring their minds to this conclusion.

As a portion of the charge given by the court was in opposition to the views we have expressed, the judgment must be reversed, and the cause remanded.

GIBBONS, J., not sitting.

REID *vs.* NASH, JUDGE, &c.

1. In debt on an administrator's bond, to charge his sureties with a judgment rendered against him as administrator to be levied *de bonis intestatis*, it is not necessary that the declaration should allege that the judgment was rendered on a debt which was a proper charge against the estate, or against the administrator as such.
2. When the record shows that pleas were filed and demurred to, the pleas found in the record will be presumed to be those which were filed, although they are not signed by counsel, nor endorsed as filed.
3. *Nil debet* and performance generally are not good pleas to debt on bond assigning special breaches.
4. A plea averring that the judgment against the administrator was not a proper debt or charge against the intestate, nor against his administrator as such, is but the statement of a conclusion, and therefore demurrable.
5. A plea averring that the intestate's estate has been duly declared insolvent and is in progress of settlement, is fatally defective on demurrer.
6. So also is a plea containing the additional averment that plaintiff failed to present his judgment as a claim against the estate within six months after the declaration of insolvency.
7. A plea of *plene administravit* is bad on demurrer, if it does not allege that the assets were fully administered before suit brought.
8. Consent to "plead in short," where a demurrer is interposed, dispenses only with formal matters, and not with matters of substance; if a plea is pleaded by name, all material averments will be considered as made; but if it is partly drawn out, the want of a material averment is fatal.

ERROR to the Circuit Court of Choctaw.

Tried before the Hon. LYMAN GIBBONS.

DEBT on an administrator's bond, in the name of Preston G. Nash, Judge of the County Court of Sumpter, for the use of Thomas C. Crimm, against James M. Reid, the plaintiff in error; the suit having been discontinued as to the other obligors in the bond, upon whom process was not served. The declara-

tion sets out the bond, and alleges a special breach of the condition, to-wit: the recovery of a judgment against the administrator to be levied *de bonis intestatis*, the issue of an execution and its return "no property found," and assets in the administrator's hands more than sufficient to satisfy it, which he wasted and converted to his own use. The defendant demurred to the declaration, but his demurrer was overruled. The pleas are stated at length in the opinion.

WATTS, JUDGE & JACKSON, for plaintiff in error:

1. The declaration is defective, and the demurrer thereto should have been sustained. It is not averred in the declaration that the judgment recovered against James H. Owen, as the administrator of John M. Owen, deceased, was upon any act or indebtedness of the said John M. Owen in his life-time, which constituted a proper charge against his estate, or upon any debt or act which was or could have been a proper charge against the said James H. Owen, as administrator of said estate. As against the administrator, the rendition and non-payment of a judgment, of the form of that stated in the declaration, would be *prima facie* evidence of a *devastavit;* but, as against the sureties of the administrator, it is not even *prima facie* evidence, they not being parties to the suit. To fix the liability of the sureties of an administrator, an actual *devastavit* must be shown; and, of course, it must be averred.—See Williams v. Hinkle *et al.*, 15 Ala. 713, and authorities there cited. In the case at bar, the surety, and not the administrator, demurred to the declaration.

2. The demurrer to the pleas of defendant below, should have been overruled. The record shows that the demurrer was to all the pleas jointly, and not to each plea separately; therefore, if any one of the pleas be good, this court must reverse.—Spann v. Boyd, 2 Stew. 480; Kent v. Long, 8 Ala. 45. Some of the pleas may be bad, but it is insisted that some of them are good; and being "in short by consent," form was dispensed with.

To sustain the third and fourth pleas, see Williams v. Hinkle, 15 Ala. 713, and authorities there cited.

Upon the fifth and sixth pleas, see Powe & Smith v. Sterrett, judge, &c., 16 Ala. 339.

Besides, under our statute, "no security for an executor or

administrator shall be chargeable beyond the assets of the testator or intestate, on account of any omission or mistake in pleading of the executor or administrator."—Clay's Dig. 228 § 34. If then, the administrator in the case at bar omitted to plead, when he was sued on the claim or demand upon which judgment was rendered, the matters set forth in pleas numbered five and six, it is clearly competent for his sureties to do it when they are sued, otherwise the statute above cited would be a nullity.

The seventh, which is a plea of *plene administravit*, is clearly good; under our statute above cited, the surety should be allowed to interpose this plea.—Williams v. Hinkle, *supra*.

3. But it may be contended that the pleas are defective, or are not to be treated as pleas, because they are not signed by counsel. That this is not a defect available on demurrer, see DeForest, Morris & Wilkins v. Elkins, 2 Ala. 50. The filing of a plea is an admission that a declaration was filed.—(Arthur & Corprew v. Broadnax, 3 Ala. 557.) So is the filing of a demurrer an admission that a plea was filed; and the defendant in error having demurred to these pleas, as pleas, is now estopped from asserting that they are not pleas. The statement of the clerk in the record that the pleas were not signed, is no part of the record, and cannot be looked to for any purpose.

R. H. Smith, *contra*:

The declaration is good.—Thompson, judge, v. Searcy *et al.*, 6 Port. 393; Burke v. Adkins, 2 Port. 236.

Nil debet to an action on a bond, is a bad plea. The second plea is performance generally, and this is bad to an action on a bond, when breaches are assigned. These are elementary principles.

The third and fourth pleas seek to litigate the question of indebtedness of the estate, notwithstanding a judgment and return of no property against the adm'r. That this cannot be done, see Dean *et al.* v. Portis, 11 Ala. 104. This case holds (p. 107) that "the judgment rendered in the primary cause cannot be opened by the pleadings and evidence." The conclusion results too from the fact that the administrator is the sole representative of the estate. When no fraud in submitting to the judgment is set up, to allow the securities to

contest the judgment, to which they are privy, would be to make them in fact *quasi* personal representatives of decedent. If fraud were set up, it could not be done by plea at law, but must be by bill in chancery. It does not follow that the judgment was submitted to by fraud because of the facts contained in the fifth plea; and it must be taken most strongly against the pleader. In rules against the sheriff for not making money, it nas been often held that the securities need not be parties to the rule, and yet as a consequence of the verdict, a judgment goes against the sureties.—Gary v. Frost & Dickerson, 5 Ala. R. 638.

It is erroneously supposed that the statute of 1826, and the case of Williams v. Hinkle, 15 Ala. 713, allows these pleas.—Dean *et al.* v. Portis, *supra*, p. 107. The mispleading or failure to plead by the executor cannot, by statute of 1826, injure the securities. The effect of this statute is, to put the plaintiff in a suit on the bond, to prove an actual *devastavit*. If none such has occurred, it is difficult to see how admitting the conclusiveness of the judgment against the administrator can injure them, as it is no evidence of assets against them. If a *devastavit* has occurred, of course there is no injury. Williams v. Hinkle decides that the judgment does not fix a *devastavit* as against the securities, but it is very far from holding that it does not fix the indebtedness of the estate, and gives no countenance to such a position.

The fifth plea simply means this: admitting that eighteen months had expired before judgment against the administrator, admitting that the debts were all known before such judgment, the estate was not reported or declared insolvent, yet, since the rendition of the judgment, (and since the bringing of this suit,) the estate has been declared insolvent. Such is the meaning of the plea—the legal intendments being incorporated, and it receives no aid from the exception to the general rule very properly created by Powe & Smith v. Sterrett, 16 Ala. 339, nor from the statute of 1826; for the plea being true does not establish that there was mispleading or failure to plead, unless it can be said that not pleading that which does not exist is a mispleading or failure to plead.

It is difficult to see how the seventh plea can, in point of law, be true. Under our statute, there can be no other than an

equitable (equal) distribution of assets. How then can a plea of *plene administravit* be good under our law, without setting out that in whole or part the plaintiff was paid? In no other way than by medical bills and funeral expenses having consumed the assets, and if so, this is an exception to the rule of payment of creditors and should have been pleaded. But the plea is open to another and more fatal objection; it amounts to this: the security pleads in bar of the action, (and of course of costs accrued,) that the administrator has fully administered, not that he had before suit brought. It should have added that he (the administrator) hath not, nor on the day of commencement of the suit of the plaintiff, or at any other time since, had any goods and chattels, &c.—3 Chitty's Pl. 944, and notes.

There are, in fact, no pleas in the record. The paper inserted as pleas has neither the endorsement of the clerk nor the signature of counsel, and it would be dangerous to treat every pretended paper found by the clerk among the files as part of the record. The judgment only shows there were pleas and a demurrer to them which was sustained, but *non constat* that these are the pleas.—Murrah v. Br. Bank Decatur, 20 Ala. 392; Br. Bank Decatur v. Moseley, 19 Ala. 222. It has also been held by this court (I think in 21 Ala.) that a bill of exceptions not signed by the judge cannot be looked into; and it has also been held, that it must even appear that it was done in term time; and if not, how can pleas not signed or endorsed be looked to? It cannot be said that this objection should have been taken before joining in error. The error assigned is, sustaining the demurrer to the pleas. The judgment shows there were pleas, and to them a demurrer was sustained; and this is so far record, and the plaintiff in error can assign the action of the court as error. Whether a particular paper incorporated into the record constituted such pleas is not involved in the assignment of the errors, and is a very different question.

PHELAN, J.—The demurrer to the declaration of plaintiff was properly overruled. It sufficiently avers that a judgment had been rendered against the administrator, James H. Owen, as such, to be levied *de bonis intestatis*. It was not necessary to go further in a declaration, whether against the administrator himself or a surety.—Thompson v. Searcy, 6 Por. 396; Wil-

liams v. Hinkle, 15 Ala. 713. If upon the trial it should appear, as in the case last cited, that the judgment was really not a proper judgment against the administrator as such, the surety would then be at liberty to make the question.

The record shows that pleas were filed, and demurred to; we must, therefore, intend that these pleas which are found in the record were the pleas that were filed, although not signed by counsel, nor endorsed by the clerk as filed.

The first and second pleas, *nil debet* and *performance generally*, to debt on a bond with condition and special breaches assigned, are too manifestly demurrable to need observation.—Tait v. Parkman, 15 Ala. 253.

The third plea simply avers that the debt on which the judgment against the administrator was rendered, was not a proper debt or charge against the intestate, or defendant as his administrator. This naked averment, without facts, can amount to nothing, as an answer to the declaration. The consent to "plead in short," where a demurrer is interposed, covers only formal matters, and not matters of substance.

The fourth plea avers that the judgment mentioned in the declaration was confessed by the said administrator, and was not founded on any debt or proper charge against the intestate.—Like the third, it is the mere averment of a conclusion without facts. Even fraud is not imputed. This plea was of course defective, in like manner with the last.

The fifth and sixth pleas are in these words:

"5. That the said estate of the said John M. Owen, deceased, has been by the Orphans' Court of Sumpter County aforesaid duly declared insolvent, according to the statute in such cases made and provided, and that the same has not yet been settled up and closed, but that the same is now in a course of settlement in the Probate Court of said county."

"6. That said estate of the said John M. Owen was by the said Orphans' Court &c., duly declared insolvent, according to the statute, &c., on the day of , and that said declaration of insolvency continues in all respects in full force; and that said Thomas C. Crimm, the plaintiff in said judgment, wholly failed and neglected to file his judgment, or any transcript or statement thereof, in said Orphans' Court, within six months after such declaration of insolvency."

The fifth plea does not say *when* the estate of John M. Owen was declared insolvent. If after the judgment, it would not affect it any way; and even if before, and the administrator neglected to plead that, it could not be made available by itself as a defence to this action. The same may be said of the failure of the plaintiff to present his judgment as a claim against the insolvent estate: it is no defence to this action.

The seventh plea is in these words: "7. The said James H. Owen, administrator as aforesaid, has fully administered and paid out, according to law and the statute in such cases made and provided, all the assets of the said John M. Owen, deceased, which came to his hands to be administered."

The defect of this as a plea of *plene administravit* arises from the want of an averment that the administration of the assets was made before this suit was brought. If made after, it would be no answer. Had the plea been pleaded by name, as the record states that the pleas were taken "in short by consent," all material averments would have been considered as duly made. But when the plea is drawn out to some extent, the want of a material averment makes it demurrable, even when it is pleaded "in short by consent"; and that is the case with all the pleas in this record, except the plea of *nil debet*, which is pleaded by name. Mere formal parts only are considered to be dispensed with by the consent given, and not matters of substance, when pleas are taken "in short by consent," unless it is where a well known plea is pleaded by name.—Gayle v. Randall, 4 Por. 232; Pollard v. Staunton, 5 Ala. 451.

We find no error in the record, and the judgment below is affirmed.

MOORE ET AL. *vs.* BARCLAY ET AL.

1. When two conflicting opinions are delivered in the same case at different times, and it is brought up a third time on error or appeal, neither one of the previous decisions is conclusive, but the case must be considered as if presented for the first time.
2. When a judgment is freely and voluntarily confessed, with full knowl-

edge on the part of defendant of all the facts connected with it, and without any fraud or collusion on the part of plaintiff, the defendant is estopped from setting up any defence to the debt which existed anterior to such confession, and a court of equity cannot afford relief against it except upon some equity subsequently arising.

APPEAL from the Chancery Court of Talladega.

Heard before the Hon. E. D. TOWNES.

THIS bill was filed by plaintiffs in error against the defendants in error, on the same facts, and, as far as can be perceived, making the same case, as is made by the bill in the case of Moore v. Barclay, in 16 Ala. 158; and the report of the facts of the bill as stated in that case is referred to, as being substantially the allegations of the bill in the present record. The only difference which we observe is, that in the present bill is the statement as to how the complainants Story and Dixon became parties to the present record, viz., that they were sureties on the injunction bond of Moore, filed in the case above alluded to. There is also this additional fact in the bill now presented, which was not in the former bill, viz., that the final decree made in the former case was, that the complainants' bill was dismissed without prejudice. In all other respects the present bill seems to be the same as that in the case above referred to.

The answer in the present case also seems to be nearly identical with that made in the case reported in 16 Ala., so far as the facts had at that date transpired; and the report of the answer in that case is referred to, as containing a correct statement of the facts up to that date. The present answer denying the agreement alleged, and set out in the bill as the one on which the judgment was confessed, is more full and specific than the answer reported in the other case; and according to the present answer, the judgment was confessed by the complainant upon no condition or contingency whatever, as to the future liability of the complainant, but for a debt absolutely due and payable then, and subject to be enforced at any time when the defendant should choose to enforce it; it being entirely discretionary with the defendant to give the complainant such time, and only such time, for the payment of the money as he thought proper, and such grace shown to the complainant by defendant forming no part of the consideration or agreement on which the

judgment was confessed. The answer further states the facts, that the allegation of the bill stating that the decree in the first case was that the bill be dismissed without prejudice is not true in point of fact, as the record in its present shape does not speak the truth; and asserts the fact to be, that the first bill was dismissed generally, without the saving clause, ("without prejudice,") but that the latter qualification was added by such a person and under such circumstances that such addition could be of no force or validity. The answer then states the fact to be, that on the trial of said cause the Chancellor presiding rendered his decree dismissing the bill generally, without any qualification or saving clause, and that the decree was duly enrolled in that form, and so remained until after the minutes were signed and the court adjourned; that afterwards the said Chancellor, at the solicitation of the plaintiff's counsel, and in the absence of the defendant's counsel, altered the said decree, and caused the said record to be altered by the insertion of the qualification "without prejudice," and which the defendant insists makes the record untrue in point of fact; and the answer insists that, in the consideration of the present case, the defendant is entitled to the consideration of these facts and circumstances in reference to said alteration of the record.

The answer further insists, that as the same case is now made by the bill as that made by the last bill, and as on the trial of the last bill, on bill, answers, exhibits and proofs, the said bill was dismissed, it must be considered as *res judicata* by this court, and conclusive of the present case. With these modifications and additions, the answer in the present case is substantially the same as that set forth in the case reported in 16 Ala.

The complainant excepted to all that portion of the answer which seeks to impeach the record of the former chancery suit, and the exceptions were sustained by the court, and that portion of the answer ordered to be stricken out. On the answer as it stands, after this part is stricken out, the defendant moved the court to dissolve the injunction that had been obtained by the complainant on the filing of his bill. The prayer of the bill in this case, as in the case reported in 16 Ala., is, that the defendant be enjoined from proceeding to collect his money on the judgment confessed as set forth in the bill. It seems, after the

final decree in the first case dismissing the complainant's first bill without prejudice, the defendant issued another execution on said confessed judgment against said Moore, and against the other complainants who were his sureties on the injunction bond. This bill was filed to enjoin further proceedings on this second execution. The Chancellor was of opinion that the answer of the defendant did away with the equity of the complainant's bill, and therefore dissolved the injunction; from which decision the complainants appealed to this court, and for error assign the decision of the Chancellor in dissolving the injunction; and the defendants assign cross errors, that the Chancellor erred in sustaining the exceptions to the answer, and ordering that portion of it excepted to to be stricken out for scandal and impertinence.

The opinion which was delivered at the January term, 1851, on error from the final decree in the former case, has never been published. It is as follows:

PARSONS, J.—This case was here once before, by appeal from the order dissolving the injunction.—Moore v. Barclay, *et al.*, 16 A. R. 158. But it is now here after the final decree upon the merits, by which the bill was dismissed. The Chancellor thought that the case as stated in the bill, was neither admitted by the answer, nor proved, and we are of that opinion. It does not appear that the sale by Spence, at which Barclay was the purchaser, was made on credit, or for any thing but money. No such illegal proceeding was comtemplated at the time of the sale or before, so far as appears. These irregularities had their origin after the sale, and the sale itself was not therefore void; but Barclay was and is liable for the purchase money, and Spence, as sheriff, and his sureties, are also liable for his irregular conduct after the sale; but whether he is liable for not having made the money, or upon the ground that, having subsequently accepted from Barclay what was not a lawful payment in discharge of the purchase money, he is estopped from gainsaying the fact of payment in money, is not to be determined in this case. This is not a bill to set aside that sale. Possibly W. H. Moore, the defendant in the executions, might be able to show enough to set it aside; but John M. Moore, the complainant, cannot annul it for him; or if a creditor, or one having a creditor's rights, may annul such a sale,

yet the debtor, whose lands were sold, ought to be a party to such a suit, that he might be enabled to show cause against it, and that the debt against him is satisfied. But the present bill is clearly not one to set aside or annul the sale. The complainant claims relief upon other grounds against the judgment which he confessed in favor of Barclay. The undisputed parts of the case are: that Griffin, as sheriff of Talladega County, sold some of William H. Moore's lands, under different executions against him, and the complainant was the purchaser; that Spence, as the succeeding sheriff of that county, sold the same lands under several other executions against William H. Moore, and the defendant, Barclay, became the purchaser, to whom they were conveyed by the sheriff; Barclay commenced his suit for the lands against a tenant in possession, but pending this suit agreed to convey the lands by quit-claim deed to the complainant. The bill and answer differ in respect of the consideration of this agreement in several particulars, but it is sufficient to notice one of them. The parties agree in their statements that the judgment was confessed as part of the consideration of the conveyance by the quit-claim deed. But the complainant states by his bill, in substance, that the judgment was confessed as a means of enabling Barclay to coerce payment, in the event of having to pay, and of actually paying the amount of his bid for the lands, the complainant having agreed to save him harmless against his bid. The bill states that there was a contest among the execution creditors for the money, and that the complainant had purchased one of the executions, (that in favor of the Branch Bank at Montgomery,) which was entitled, as he alleges, to the money. According to this statement, Barclay is not entitled to the money for which the judgment was confessed, first, because he has not legally paid the amount of his bid; and, secondly, because, if paid, it would belong to the complainant, to whom the execution having the preference belongs. But Barclay states in his answer that the agreement was, that the complainant should pay him for the quit-claim conveyance certain considerations, that of the money for which the judgment was confessed being part; and the agreement being that, if the complainant should pay the several considerations, the defendant, Barclay, would convey the lands he purchased by quit-claim deed to the complainant.

This is a clear negation of the statement in the bill upon that point, which is very material. According to this part of the answer, the defendant was not to be saved harmless against his bid, otherwise than by a payment to him of the money by the complainant, before the quit-claim deed was to be executed. It is further stated in the answer, that long after this agreement was made, and after the defendant had made to the complainant a quit-claim deed to one portion of the land, the complainant called on the defendant for a like deed to the other portion, stating the circumstances in which he was placed, in consequence of which it was necessary for him then to have the deed, but that he was unable, at that time, to pay to defendant the amount of the bid and the other considerations, and asked the defendant for indulgence as to part of the sums he had agreed to pay, but requested him then to execute the deed for the residue of the lands. The defendant adds, that he told the complainant at that time, what was really true, that he had not paid to Spence what he had bid for the lands, but after the sale was made Spence agreed that defendant need not pay him immediately, and that the defendant thereupon promised Spence to pay the amount whenever called on. It is further stated in the answer that the defendant, on this occasion, proposed to indulge the complainant for the amount of the bid, and to make the quit-claim deed as desired, on condition, as to the amount of the bid, that complainant would confess judgment in favor of the defendant for the amount of the bid and interest thereon, so as to place it in the power of the defendant to collect the amount of the bid and interest, whenever Spence should call on defendant for the same, and that the complainant accepted the proposition—the deed was executed, and the judgment was confessed. The answer states other facts, in substance, that defendant told complainant that if he would pay Spence the amount, the defendant would take it in satisfaction of the judgment; but the defendant denies that the judgment was confessed on the agreement stated in the bill, or on any such agreement, or on any agreement except the one stated in the answer. He states, that he subsequently paid the amount of his bid to Spence; but it is sufficient for us to say, in reference to that, that the payment was of no validity as against the creditor who may be entitled to the money.

The material allegations of the bill are, therefore, denied by the answer, and not supported by the evidence. According to the answer, the money for which the judgment was confessed was to be paid absolutely, and not upon any condition or contingency. The judgment was confessed without stay, and for a debt due. The defendant contemplated a payment to Spence with the money for which the judgment was confessed. Hence he wanted to have the power to coerce payment when he should have to pay, so as to be enabled thereby to make the payment, and the judgment was confessed in the usual form.—The object was to accommodate the complainant, and not to tie up the hands of the defendant forever, unless Spence should call for the money; that would not be according to the real intention of the parties. The complainant had reasonable indulgence at least, and with that he ought to be satisfied; for the agreement was not made upon the idea that the money would be coming to him; that is not admitted by the answer, nor proved. Neither is the bill founded on the ground that the defendant had deceived the complainant in respect to the payment, or rather the non-payment of the purchase money to Spence. Nothing of the sort is alleged. But, if that were the case, the complainant had a clear remedy at law, although the defendant only conveyed by quit-claim deed.—Com. Dig., Title Action on the Case for Deceit, A 8; 1 Salk. 211; Roberts v. Anderson, 3 Johns. Ch. Rep. 371. As to that, the Chancellor might well leave the complainant to his remedy at law. This bill is not founded on an unexecuted agreement to convey. It appears that the agreement was to convey by quit-claim deed, and the conveyance was fully executed according to the agreement.

But notwithstanding all this, if the complainant did purchase the judgment which had the prior lien, as stated in his bill, then the question is, whether or not the money to be paid by Barclay upon his bid is coming to him. Passing over the question whether his statement in the bill as to his purchase, is supported by the evidence in relation to the manner he derives his title, as to which there might be doubt at least, we come to the last question: Is the execution, which the complainant alleges he purchased, shown to be entitled to the money which Barclay is to pay upon his purchase? This question may be quickly disposed of. The complainant alleges, first, that the sales by

Griffin, under which he purchased, were under divers executions against Wm. H. Moore, and that the sales by Spence were under divers other executions against Moore; that he purchased the execution in favor of the Branch Bank at Montgomery, which had the preference, as he states. This is not admitted by the answer, and the question therefore is, is it proved by the complainant? He proves an execution in favor of the Branch Bank at Montgomery against Wm. H. Moore, and he proves there was a purchase of it by him in a particular manner, and this we pass over. But the question arises, was that execution entitled to the lien or preference? The complainant states several executions generally under which each of the sales took place, but he mentions two specially: that which he states he purchased, and that which was in favor of one Campbell, to the use, &c., against Wm. H. Moore. Now the question is, has the complainant shown, as against the executions generally, which he mentions, and more particularly, as against the execution in favor of Campbell, use, &c., that the execution in favor of the Branch Bank at Montgomery, of which he says he was the purchaser, was from the elder judgment and entitled to the money? He states in effect that it was entitled to the money, but he does not prove it, and the defendant does not admit it; and, therefore, the complainant does not appear to be entitled to the money which Barclay is bound to pay in consideration of his purchase, to the execution from the eldest judgment, which is entitled to it.

The complainant states a contest among the different creditors for the money, and that the case came to this court, and that it was here held that the execution in favor of Campbell was entitled to the money; but this is not admitted or proved. The bill, however, alleges that an injunction was afterward granted and perpetuated against proceedings under the execution in favor of Campbell, use, &c. But this is not admitted or proved. After all that is stated in the bill, it was necessary for the complainant to prove the fact that Campbell's execution was perpetually enjoined, for the purpose of removing the inference from his other statement that Campbell's execution was certainly or probably entitled to the money. The case made by the bill is therefore not supported by the evidence.

The decree is affirmed. CHILTON, J., not sitting.

WHITE & PARSONS, for plaintiffs in error:

When this case was here before, (16 Ala. 158,) the court held that the bill contained equity, and that the injunction ought not to have been dissolved, notwithstanding the answer of Barclay denied, as it does now, the contract on which the judgment was confessed, and pleaded ignorance of the judgment in favor of the Branch Bank at Montgomery, and of complainant's right to that judgment. That decision is the law of this case, and its correctness cannot now be questioned.—Rugely & Harrison v. Robinson, 19 Ala. 412; Goodwin v. McGehee, 15 Ala. 239; Johnson v. Glasscock, 2 Ala. 522; *Ex parte* Sibbald, 12 Peters 492.

The original bill in the former case having been dismissed without prejudice, because complainant had failed in his proof, this bill was filed on the authority of the decision in 16 Ala., *supra*. Complainant has acted on the faith of that decision, and has incurred cost and expense in asserting his rights as settled by it; and he now refers to the following decisions, as showing an additional reason why he should not be deprived of the benefit of it.—Harrison v. Pool, 18 Ala. 517; McCrary v. Remson, 19 Ala. 430.

The opinion delivered by Judge Parsons at the January term, 1851, does not conflict with the previous opinion published in 16 Ala. In it the court expressly yield their views to the law of the case as decided in 16 Ala. It is a decision upon the facts of the case merely, and settles no question of law whatever. It says: "The Chancellor thought that the case, as stated in the bill, was neither admitted by the answer, nor proved; *and we are of that opinion.*"

As to the allegations of the bill, and the denials of the answer: The rule seems now to be well settled, that when the allegations are positive, as they are in this case, and the answer denies them on information and belief only, it is insufficient to dissolve the injunction.—Calhoun v. Cozzens, 3 Ala. 503; 1 Paige 100; Rodgers v. Rodgers, 1 Paige 426; Apthorpe v. Comstock, Hopkins' R. 148; Roberts v. Anderson, 2 Johns. Ch. 204; Williams v. Hall, 1 Bland 194.

RICE & MORGAN, *contra:*

1. The injunction was properly dissolved. The *gravamen* of

the bill is the agreement upon which, as the bill asserts, the judgment was confessed; and this is positively denied by the answer.—Moore v. Barclay, 16 Ala. 158; also, opinion by Judge Parsons at January term, 1851.

2. The answer sets up a state of facts entirely inconsistent with the complainant's right to recover, and denies the allegations of the bill which are not consistent with the facts stated in the answer. This is enough to dissolve the injunction. The responsive facts set up in the answer are taken as true; and if the cause was submitted for decree on bill and answer, there can be no doubt the bill would be dismissed. The bill does not allege that the facts upon which relief is sought are in the knowledge of the defendant, except the facts relating to the agreement between Moore and Barclay. These facts are denied upon information and belief, and by the positive assertion of inconsistent facts.—Hogan v. Br. Bk. Decatur, 10 Ala. 486.

If a defendant must deny positively facts not within his knowledge, in order to dissolve an injunction, there would be great oppression in many cases. It is an encouragement to bills for injunctions, which would be greedily accepted by parties who wanted delay, especially where the injunction ties up a judgment at law.

3. The pleadings show that there were other judgment creditors of W. H. Moore, besides the Branch Bank at Montgomery. The answer asserts that the transfer to John M. Moore was procured by his fraud, in order to shelter his father, and that it was procured with means of the father in the hands of John M. Moore.

GIBBONS, J.—The cross-assignments of error are, as we understand, withdrawn by the defendant in error, and consequently it does not become necessary to consider them in the present opinion. Indeed we could not consider them on the present appeal, as the dissolution of the injunction alone can be considered in the present state of the record.

The record before us presents a question certainly novel in this court, and by no means free from difficulty. In the case reported in 16th Ala., the question was, whether the injunction was properly dissolved on the coming in of the answer; in other words, whether the answer did away with the equity of the bill.

The court below decided that it did, and dissolved the injunction. From this decision an appeal was taken to this court, when it was held that the court below decided the law incorrectly, and the case was reversed. On the final hearing of the same cause, the court below decided that the complainant, on the case made, was not entitled to relief, and dismissed the bill without prejudice. On appeal from this decision to this court, it was affirmed. Here, then, we have two decisions of this court in what is apparently the same case, directly the opposite the one to the other. If either, which is to be regarded as authority in the case now presented? Our decision ought to be in favor of the one which is to be regarded as authority in the present case. If both are to be regarded as of equally binding force upon the court, then, balancing each other as they do, we should feel at liberty to view the case now presented upon the present record as for the first time, and to decide it accordingly. This latter view we consider as correct, so far as regards the binding validity of the two former decisions.

Let us see, then, how the case stands upon principle, independent of authority. In the plaintiff's bill, as we understand it, are presented two facts, which, taken together, constitute the main equity of his bill: the one, that the judgment confessed, and sought to be enforced by the execution enjoined, was so confessed upon the distinct understanding and agreement that said judgment should not be enforced unless the said Spence should call upon the defendant for the amount of his bid, and until such call made by Spence the judgment did not in fact become due; the other fact is, that the execution entitled to the money arising from said bid, viz., that belonging to the Branch Bank at Montgomery, was owned and controlled by the complainant, so that he could at any time stop the collection of the money on said bid, and if it was paid by complainant to defendant, and by defendant to Spence, it would have to be paid by Spence to complainant as the rightful owner of the money, and therefore he ought to be permitted to set-off his right to receive the money from the sheriff Spence against the defendant's right to receive the same from him, the complainant. The answer of the defendant denies positively the first of these facts, and asserts that the judgment is due, and was so at the time it was confessed, and that the same was to be paid in any event, unless

the complainant would procure the receipt of Spence for the money, and this was confessedly to the defendant the same as money; but that the complainant failed to do this, and let the matter rest until the defendant had paid Spence himself. The other fact the answer does not positively deny, except upon information and belief, and calls for proof of its existence. We readily concede that these two facts of the bill, taken together as true, constitute an equity which would save it from being demurred to successfully; and whilst we readily concede that there is no necessary connection in the nature of things between the two facts, which renders them dependent the one upon the other, for the purpose of constituting an equity, yet it becomes important in the present case to inquire whether the bill with the fact which is denied by the answer stricken out, and containing only the other leading fact relative to the complainant's being the proprietor of the execution represented by the Montgomery Bank, to which the money bid by the defendant was due, would contain equity. The moment the inquiry assumes this shape, we have at once presented the following case: The complainant, owning a judgment in favor of the Branch Bank at Montgomery for upwards of $1000 against Wm. H. Moore, his father, which is entitled to the unpaid bid of the defendant to Spence, goes into court and confesses a judgment in favor of the defendant for about $1000, without any qualifications or reservations whatever, and that too fully cognizant of all the facts appertaining to the transaction and every part of it. The bill itself shows that the complainant had in fact been the proprietor of the Montgomery judgment and execution since some time in 1842, and the judgment was confessed in 1844, and with a full knowledge that the purchase money on said bid had not then been paid. No charge is made of concealment, no misapprehension of facts, no deception practiced in any manner whatever.—The question now arises, could a court of equity, any more than a court of law, give any relief against a judgment confessed under such circumstances? Would not a court of equity be bound to say to the complainant, as would a court of law, You have made your own case for yourself, by your own acts freely and voluntarily done, and you are estopped from denying that a debt is due, which you have solemnly confessed in open court was owing to the defendant; in other words, the confession of the

judgment would be a waiver of all defences existing to the debt anterior to the time of such confession, and that judgment could only be affected by some equity arising subsequent to its confession, or by some fraud in the procurement of such confession. This fraud is charged in the bill, and denied in the answer, and it must therefore be viewed by this court as a confession of judgment freely and voluntarily made without fraud or collusion on the part of the defendant. This view of the bill and answer, as presented to this court, in our apprehension, leaves the bill when considered with the answer without equity; in other words, the answer has so far denied the allegations of the bill as to leave it without equity, so far as respects the remaining facts not denied by the answer, and we consequently concur with the Chancellor in his views that the injunction ought to be dissolved on the answer. It follows, therefore, that the decree of the Chancellor is affirmed.

CHILTON, C. J., having been of counsel, did not sit in this case.

RANDALL AND RANDALL *vs.* LANG.

1. A voluntary deed or relinquishment from father to son is good, as against the grantor's subsequent creditors, when no actual fraud is shown.
2. The title to personal property descends to the personal representative, and the parties beneficially interested take as distributees under the statute.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

GEO. N. STEWART, for appellants.

C. W. RAPIER, *contra.*

CHILTON, C. J.—This was a trial of the right of property, commenced before a justice of the peace, wherein John Lang, who had obtained an execution against Wm. D. Randall and his wife, Elmira, sought to condemn a negro boy slave,

named George, to its satisfaction. The said slave was claimed as the property of William and James Randall, children of said defendants. The trial before the justice resulted in favor of the claimants, and Lang appealed to the City Court, where the slave was condemned, and from this judgment the claimants appealed to this court.

The material facts, as they appear by a bill of exceptions which has been ordered to be made a part of the record in this cause, are as follows: The plaintiff in the execution proved that the slave levied on was seven or eight years old; that he was the son of a negro woman named Jinsey, and was born and raised in the family of the said William D. Randall; that said George and his mother, Jinsey, were both in the possession of said Randall and wife when he was levied on; he also proved his value, and rested his cause.

The claimants proved that they were the children of Elmira Randall, who was the daughter of Jesse Jayne, and is now the wife of Wm. D. Randall; that previous to her marriage with said Randall, in the year, 1832, she owned the girl Jinsey, having obtained her from one Brewster S. Jayne; that her father had called upon Thos. G. Newbold, to receive a title for said negro girl, and to keep her for the benefit of the children of said Elmira, and to secure the said slave to such children; Newbold consented, and thereupon Elmira Jayne executed to him, of date 10th May, 1832, a bill of sale for said girl, reciting a consideration of three hundred dollars; but it was designed, as Newbold proved, merely as a trust for the benefit of such children as the said Elmira might have. The loss of this instrument was shown, and its contents were proved. The girl was present when this contract was made, but went back into the possession of Elmira, who subsequently married Wm. D. Randall, and had by him a daughter, Nancy Augusta, to whose use said Newbold, on the 6th May, 1833, at the request of said Elmira and her father, Jesse Janye, executed a deed for said slave, to Henry Chamberlain, conveying her to him as trustee, &c. for the daughter. This deed was duly recorded in the Mobile County Court on the 15th June, 1833. The said Nancy Augusta died when very young, (the precise time not given,) and on the 13th May, 1837, said Chamberlain, by the consent of said W. D. Randall and his wife, Elmira, executed a deed

conveying said slave, Jinsey, to Wm. H. and James F. Randall, claimants, who were minors and brothers of said Nancy Augusta, born after she was, and who were living with their parents, the defendants in execution. The said Wm. D. Randall held possession of said girl, and of her issue, the boy now levied on, for the claimants, ever since the date of the deed and the birth of said boy, laying no claim to them himself, but claiming to hold them as the property of the appellants. The deed from Chamberlain to the claimants was recorded in the County Court of Mobile on the 24th June, 1837, and a copy is set out in the bill of exceptions.

The proof failed to show whether the claimants were born before or after the decease of Nancy A., the daughter. Neither was there any proof as to when the the debt claimed by the plaintiff in execution was contracted.

Upon tnis, which is substantially all the proof, the court charged the jury, that, if it was believed by them, the property was subject to the execution: that, in the absence of proof that Nancy Augusta died after the birth of the claimants, the trusts of the deed made to Mr. Chamberlain would not enure to them, but to Wm. D. Randall and wife, as heirs of Nancy, their daughter.

The claimants, by their counsel, asked the court to charge the jury, that, if Randall and wife had had the slave, George, for more than six years before the commencement of the suit of the plaintiff in execution, for the claimants, and holding him as their property, and claiming no right in themselves, or if they assented to the deed made by Chamberlain to them, and held the slave for them under said deed, in such case, the law would be for the claimants. This charge the court refused, and to this refusal, as well as to the charge given, the claimants excepted.

It will be observed that the facts set forth in the record raise no question as to the application of the statute of frauds to the deed made by Chamberlain to the claimants; for it does not appear that the defendants in the execution were in debt when that conveyance was made. So that, for the purposes of this trial, it may be conceded that upon the death of Nancy Augusta, for whom Chamberlain held the legal title in trust, the beneficial interest in the slave accrued to her father and mother; yet, as

it was competent for them to yield their claim, and to consent to a transfer of the property to the claimants, we see no reason why we should not uphold the transfer, if the rights of existing creditors are in no wise affected. The deed of Chamberlain having been made by the consent of W. D. Randall and wife, and they having held the slave for more than six years before the claim of the creditor accrued, for the infants under the deed, would most undoubtedly confer the title upon the infants, for it is the same, in legal contemplation, as if the infants had held possession themselves under *bona fide* claim of title.

Let it be conceded that the consent of the parents to Chamberlain's conveyance amounted to a voluntary relinquishment on their part of their beneficial interest in the slave, yet, if there were no creditors at the time, as against whom such conveyance would be constructively fraudulent, and if there was no fraud in fact, which would avoid the conveyance as well against subsequent as existing creditors, and which is not insisted upon in this case, so far as the record before us discloses, the law will uphold the conveyance, and vest the property in the claimants.

The judge in the court below, however, mistook the law as to the title which would accrue to the parents as heirs of their daughter, upon her death without brothers or sisters. In strictness of law, personal chattels do not descend to the heirs.—They go to the personal representatives of the deceased, and the parties beneficially interested take as distributees under the statute of distribution. In this case, the legal title remained in the trustee, and if the parents were the proper distributees of the beneficial interest, it was, as we have shown, competent for them (the claims of existing creditors aside) to consent to a conveyance of the entire property by the trustee to their other children. This they have done; and if there was no fraud in fact in the transaction, such as would invalidate it as against subsequent creditors, the court is bound to regard the grantees, who are the claimants, as the owners of the property. The principles which we have announced, are too well settled to require the citation of authorities to support them.

Let the judgment be reversed, and the cause remanded.

TALIAFERRO'S ADM'R *vs.* BRANCH BANK AT MONTGOMERY ET AL.

1. When a defendant in a judgment at law comes into equity for relief, alleging matters which would have constituted a good defence to the action at law, he must show by his bill that his failure to discover and avail himself of his defence at law was not attributable to any negligence or want of diligence on his part, but to fraud, accident or the act of the opposite party.
2. An allegation that complainant was ignorant of the facts on which he relies as a defence until long after the rendition of the judgment, is not sufficient.

APPEAL from the Chancery Court at Montgomery.

Heard before the Hon. JAMES B. CLARK.

THE appellant, as administrator of Thornton Taliaferro, deceased, exhibits his bill, in which he sets forth and charges, that on the 1st day of March, 1841, one Bushrod W. Bell drew his bill of exchange for the sum of $8754 80, addressed to one B. J. Guise; that said bill was endorsed by James C. Boyd and his intestate, and was bought by the Branch Bank at Montgomery; that the parties to said bill were liable according to the order in which their names appear upon it, that is, Boyd as first, and his intestate as second endorser; that after said bill was negotiated to and became the property of said Bank, Thornton Taliaferro died insolvent, and the complainant became his administrator; that pending such administration the Bank filed the bill of exchange as a claim against the estate of said Thornton Taliaferro, and judgment was rendered by the Orphans' Court in its favor, for $1446 42, the *pro rata* share of this demand in the assets of the estate of said Thornton Taliaferro, deceased.

The bill then charges, that, since this judgment was obtained, the complainant has been informed and believes, that, at the time of such judgment, the Bank had no claim or demand against the estate of his intestate, and that before that time Boyd, the first endorser on the bill before mentioned, had paid the amount in full to the Bank; that "this was not known to

orator until long after the rendition of said judgment in said Orphans' Court as aforesaid."

It is further alleged, that if the debt was not so paid, that some secret arrangement, founded on sufficient and valuable consideration, had been made between Boyd and the Bank, by which the latter agreed with the former to extend the time of payment, without the knowledge or consent of the complainant or his intestate, and that complainant had no knowledge of this arrangement, "until long after the rendition of said judgment in the Orphans' Court, and for this reason said defence was not made in said Orphans' Court before judgment."

It is further charged, that, notwithstanding these things, the Bank has had execution issued, which is now in the hands of the sheriff, and is thus attempting to enforce the collection of its judgment. The bill prays an injunction and general relief.

Boyd and the Bank answer, and also demur to the bill for want of equity.

The Chancellor sustained the demurrer, and dismissed the bill; from which decree the complainant appealed to this court, and here assigns it for error.

T. Williams, for appellant, cited Dunham v. Carter & Carroll, 2 Stewart 496; Boyd v. Woodfin, 3 Stewart 360; Corner v. Corner, 3 Ala. 524; Gray v. Dennis, 3 *ib.* 716; 9 Porter 631; 13 Ala. 471.

N. W. Cocke, *contra* :

There is no equity in the bill:

1. The charge, as to the payment of the debt by Boyd, puts in issue the fact of the complainant's information merely, and not the fact of the payment.—Story's Eq. Pl. § 242 to § 256; Reed v. Walker, 18 Ala. 332; Spence v. Duren, 3 *ib.* 253.

2. The bill does not show such an excuse for failing to make the defence at law, as will justify the interposition of a court of equity.—5 Port. 547; 2 Ala. 20; 9 *ib.* 120; 17 *ib.* 672; 17 *ib.* 719; 19 *ib.* 686.

3. There is no allegation that the debt has been paid by Boyd since the rendition of the judgment; but if there was, it would not benefit the complainant, for in that case, he has a complete remedy at law.—19 Ala. 686, *supra.*

LIGON, J.—A long and unbroken chain of decisions in this court hold, that when a defendant at law, after judgment, seeks the aid of a court of chancery, in matters which would have formed a good defence at law, he must show by his bill that his failure to discover and avail himself of his defence at law is not attributable to any negligence or want of diligence on his part, but to fraud, accident, or the act of the opposite party.—McGrew v. Tombeckbee Bank, 5 Por. 547; French v. Garner, 7 *ib.* 549; Lee & Norton v. Insurance Bank at Columbus, 2 Ala. 20; Stinnett & Townsend v. Br. Bk. at Mobile, 9 *ib.* 120; Foster v. The State Bank, 17 *ib.* 672; Powell v. Stewart, *ib.* 719; Perrine v. Carlisle, 19 *ib.* 686.

In the case of McGrew v. Tombeckbee Bank, the defence relied on by the surety was, that the principal had paid the debt to the Bank in a few days after the note was discounted, and such was proved to be the fact; but the bill there simply alleged, as does this bill, that the complainant was ignorant of his defence until long after the trial and judgment at law, but did not show that the complainant had made any inquiry at the Bank, or of any of the other parties to the note, to ascertain his defence before the trial at law, and for this reason the court held that his bill was without equity. In cases of this kind, it is not only necessary that the party should show a good and valid defence to the action, but he must exempt himself from all blame for failing to use it at law. A good defence and ordinary diligence in ascertaining and relying upon it are both required to entitle him to a standing and to relief in a court of equity.—Crafts v. Dexter, 8 Ala. 767.

While it is clear that either of the defences set up in this bill would have been available at law, it is equally evident that complainant does not even attempt to show that he used any diligence whatever to ascertain them before the judgment was obtained in the Orphans' Court. From his own showing, culpable negligence is attributable to him, and he offers no facts to excuse himself.

The demurrer was, therefore, properly sustained by the Chancellor.

We have, however, extended our examination of this case beyond the demurrer, and find in the answer of Boyd and the Bank, and in the testimony of Whiting, facts which clearly es-

tablish that this bill was drawn under an ignorance or mistake of the true state of the case between the parties. Without pretending to say what would be the issue of a new bill, predicated on the state of the facts found in the answers and proof, we think enough is shown by them to have authorized the court below to have dismissed the bill without prejudice, and as the whole case was before the Chancellor, such should have been the decree. The decree must for this reason be reversed.

Let a decree be here rendered, dismissing the bill without prejudice, at the cost of the appellant.

JORDAN *vs.* RONEY.

1. Plaintiff declared on a contract by which defendant promised to pay in consideration that plaintiff would cure a certain negro belonging to defendant, and offered in evidence a contract by which defendant promised to pay in consideration that plaintiff would take said negro "and effect a cure *free of any charge for board*": *Held*, that the contract offered was not admissible evidence under the declaration, the consideration therein expressed being different from that alleged in the declaration.
2. Plaintiff undertook to take charge of a certain negro belonging to defendant, "and effect a cure of the same free of any charge for board," and defendant promised, in consideration thereof, to pay a stipulated sum "six months from the time that the cure of said negro is effected, or from the date that he is returned and pronounced well; the intention and understanding of the parties being, that a sound and perfect cure is to be effected, for which the said J. (defendant) is willing to pay the above sum, otherwise he is not to pay anything": *Held*, that the legal effect of defendant's promise was, to pay the sum stipulated six months after a perfect cure had been effected, or six months from the time when the negro was returned perfectly cured; that plaintiff's declaration when he returned the negro, 'that he was well,' was admissible evidence for him, not as evidence of the fact that a cure had been effected, but to show that plaintiff had returned him as well, and thus fix the time when the six months would commence to run; and that evidence of the negro's condition more than six months after his return, was admissible to show that he was not perfectly cured when returned.

ERROR to the Circuit Court of Macon.

Tried before the Hon. JOHN G. SHORTER.

Roney brought his action of assumpsit against Jordan, and declared on an agreement in writing made by the defendant on the 8th day of May, 1851. The declaration, after setting out the date of the agreement, proceeds thus: "And thereby, then and there, promised, in consideration that said plaintiff would take a certain negro boy of the said defendant, who had a sore leg, and effect a cure of the said leg, to pay to the said plaintiff, six months after or from the time said cure was effected, or from the date that the said negro was returned by the plaintiff and pronounced well, the sum of $100; and then and there delivered," &c.

On the trial the plaintiff introduced an agreement as follows: "Memorandum of an agreement entered into this day, between Benjamin Roney of the first part, and Samuel Jordan of the second part, witnesseth, that the said Roney agrees to take a certain negro boy of the said Jordan, named Alfred, who has a sore leg, and effect a cure of the same free of any charge for board, in consideration of which the said Jordan agrees to pay said Roney the sum of one hundred dollars, payable six months from the time the cure of said negro is effected, or from the date that he is returned by said Roney and pronounced well; the intention and understanding of the parties being, that a sound and perfect cure is to be effected, for which the said Jordan is willing to pay the above sum, otherwise he is not to pay anything. May 8th, 1851.

(Signed) Benjamin Roney.
Samuel Jordan."

This was objected to, on the ground that the agreement offered varied from that described in the declaration; which objection was overruled, and the agreement allowed to go the jury. The plaintiff then proved that the boy was returned by him to the defendant on the 1st of September, 1851, and offered evidence tending to show that said negro was cured when so returned; but upon this point the evidence was conflicting.

The plaintiff then offered to prove, that when he returned the negro, he (the plaintiff) pronounced him well; which evidence was objected to, and the objection overruled.

The defendant then offered evidence tending to show, that from the appearance and condition of the negro's leg in July, 1852, he was not cured at the time he was returned.

Upon this evidence the court charged, that by the terms of the contract the plaintiff stipulated to receive defendant's negro free of charge for board, and to effect a perfect cure of the sore upon his leg; and that the defendant stipulated for six months time after his return by the plaintiff to ascertain the fact, and that at the expiration of six months he would pay the plaintiff one hundred dollars if the negro was cured at the time of his return; that the jury must ascertain when the negro was returned to the defendant by plaintiff and pronounced well, and whether at that time a perfect cure had been effected; and if they found such to be the fact, it devolved upon the defendant to show, by evidence within the six months after the return of the negro, that the sore was not cured; and if he had failed to do so, they must find for the plaintiff; and that the jury could not look to any evidence of unsoundness after the six months, and must disregard any evidence of unsoundness in July, 1852, if the six months had previously expired. The defendant excepted to the rulings of the court upon the evidence and also to the charge, and the same are here assigned for error.

Clopton & Ligon, for plaintiff in error.

Geo. W. Gunn, *contra*.

GOLDTHWAITE, J.—One of the terms of the agreement offered in evidence is, that the plaintiff was to board the negro during the time he was engaged in effecting a cure, and this formed a part of the consideration, on which the promise of the defendant was based. The declaration, however, set up the curing of the negro as the only consideration for the promise, and in that respect varied from the agreement offered. The consideration being entire, it was necessary to prove one that was identical with that alleged in the pleadings.

The court, therefore, erred in allowing the agreement offered to go the jury under the declaration as framed.

There was no error in admitting the declaration of the plaintiff at the time he returned the boy, "that he was cured," although that declaration would be no evidence of the fact; it was simply evidence to show, that under the agreement the plaintiff had returned the boy as well of the disease which he had undertaken to cure, the defendant having stipulated to pay

the sum agreed on, six months after such return, if the boy was in fact cured. The return of the boy by the plaintiff, coupled with the declaration then made by him, would indicate the point of time from which the six months was to commence running, and thus fix the period when the defendant became bound to pay the money.

The charge of the court was clearly erroneous. The legal effect of the agreement, so far as the defendant was concerned, was, that he should pay the sum stipulated six months after a perfect cure was effected, or from the date when the boy was returned as well, if a cure had been effected when so returned.—The only issue of fact presented upon the evidence was, whether the boy was cured at the time of his return in September, 1851, and any testimony which conduced to show that such was not the case was admissible. The court construed the time specified in the agreement for the payment of the money as having been fixed by the parties, for the purpose of ascertaining whether the cure had been effected, and this may have been one object of the defendant in postponing the day of payment for six months; but the agreement is express, that if a perfect cure was not effected the defendant was to pay nothing. The record shows that evidence was offered, showing the appearances of the leg more than six months after the boy was returned as well, and, as we understand the bill of exceptions, other testimony was also offered tending to show that from such appearances the boy was not in fact cured at that time. This evidence, as we have seen, was admissible, and as the effect of the charge given by the court was to exclude it from the consideration of the jury, it was erroneous.

The judgment is reversed, and the cause remanded.

MINTER AND GAYLE *vs.* BR. BANK AT MOBILE.

1. A failure on the part of a creditor to present his claim to the administrator of the principal debtor within eighteen months after the grant of letters, does not discharge the sureties, nor affect his right to proceed against them.
2. When a letter is annexed as an exhibit to a bill, and prayed to be taken as part of it, its statements, if not in any manner qualified, thereby become the statements of the bill.
3. On a motion to set aside the sheriff's return on an execution, it is competent for the defendant in execution to show that the money had been paid, as the return showed, and had been tendered and refused, and by tendering it anew to avoid interest and any further issue of execution; and if he fails to do this, he cannot come into equity for relief, unless he explains the omission satisfactorily.

ERROR to the Chancery Court of Dallas.

Heard before the Hon. JAMES B. CLARK.

THE plaintiffs in error, William T. Minter and Matthew Gayle, filed their bill against the Branch Bank at Mobile, setting forth that the defendants had recovered a judgment against them, as the sureties of one Pritchard, on a note for $500, in 1842, in the Circuit Court of Mobile; that shortly after the rendition of the judgment, an execution was issued on it, which was placed in the hands of the sheriff of Dallas; but no money was collected under it; that another execution afterwards was issued in 1844, on which the money was paid in full by complainants, each paying one half; that said sheriff of Dallas soon afterwards made application to said Bank to pay over the money thus collected, and was told that the Bank had no such claim, whereupon Gayle's money was returned to him, and Minter's was paid over on another judgment which the Bank had against him; that affairs continued in this state until 1851, when another execution was issued against complainants on said judgment, for the amount of the original judgment and interest to date, which is about to be levied; that the Bank neglected to present the note on Pritchard to his administrator within eighteen months after the grant of letters on his estate, and thus lost all remedy against his estate, and it is insisted that com-

plainants, as sureties, are entitled to claim advantage of the Bank's laches. The bill prays an injunction against the execution, and general relief.

The complainants annex to their bill, and pray that it may be taken as a part thereof, a letter from Mr. Holcombe, the assistant commissioner of said Branch Bank, in which he says, among other things, that the sheriff's return on the execution in 1844, showing the payment, had been set aside upon a full hearing, in the Circuit Court of Mobile in 1848, and execution on said judgment ordered to proceed. The Chancellor dismissed the bill for want of equity, and his decree is now assigned for error.

Geo. W. Gayle, for plaintiffs in error.

J. W. Lapsley, *contra.*

PHELAN, J.—There is nothing in the point that the Bank neglected to present the note on which the plaintiffs in error were sureties only against the estate of Pritchard, their principal, within eighteen months after the grant of letters on his estate, and so lost its remedy on him, and that they, as sureties, will be allowed to stand in the same position as their principal. The question is already settled to the contrary, in the case of McBroom v. The Governor, 6 Por. 32.

The bill, as to the demand for interest on the judgment from 1844, when the money, as it is alleged, was tendered to the Bank and refused, would, we incline to think, have equity in it, if this allegation were not deprived of its force by the adoption of the letter of Mr. Holcombe, the assistant commissioner, to the solicitors of the complainants, as part of the bill. The statements of this letter relating to the subject matter of the bill are thereby made the statements or averments of the bill, since they are not in any manner qualified, but simply annexed by way of exhibit, and prayed to be taken as part of the bill. This letter states directly, that the receipts of Connolly, the sheriff of Dallas, as for money received of Gayle and Minter in 1844 in full satisfaction of the execution, and endorsed upon it, were nullities, and were so pronounced, and the same, as a return of the sheriff, set aside by judgment of the Circuit Court of Mobile, after a full hearing in 1848; and that execution on the judgment was ordered to proceed.

This is equivalent to an admission in the bill that, in 1848, the return of the sheriff was, upon a full hearing, which implies of course due notice to the complainants, set aside, and the execution ordered to proceed. Such an admission, it must be seen at once, does away with the force of that part of the bill which alleges that the money had been paid, that the same was afterwards tendered and refused, and praying that no interest should be allowed from the time of the tender and refusal.

On the motion to set aside the return of the sheriff, it was competent for the defendants in the execution (the complainants in this bill) to have shown that the money had been paid, as the return showed, and had been tendered and refused, and by tendering it then anew, to avoid interest, and any further issue of execution. If this was not done or attempted, and the complainants have not explained the omission satisfactorily in their bill, the presumption exists that, as there was a lawful opportunity to submit that defence to the further issue of execution and the payment of interest, it was done, and the matter is *res adjudicata*.

Putting this construction upon the bill as a whole, and we see no way to avoid it, the decree of the Chancellor dismissing it for want of equity was proper.

We are, however, of opinion that the bill should be dismissed without prejudice. Let a decree be rendered here accordingly, at the cost of the plaintiffs in error.

STEELE *vs.* WYATT'S ADM'R.

1. The Orphans' Court having granted an order of sale of "all the *perishable* property" belonging to an estate, the administrator proceeded under it to sell all the *personal* property, including the negroes, and made due return of the sale to the court, which was received and ordered to be recorded; and the administrator *de bonis non* afterwards brought detinue for one of the negroes sold: *Held*, that in the absence of a statutory definition of the term "*perishable* property," as applied to the estates of decedents, the order should receive the same interpretation given to it by the court that made it and the parties acting under it, and that the sale passed the legal title to the slaves.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. ANDREW B. MOORE.

DETINUE by the appellee, who is the administrator *de bonis non* of Peter Wyatt, deceased, for a slave named Jeff. The pleas were, the general issue and the statute of limitations. Verdict and judgment for the plaintiff below.

On the trial a bill of exceptions was allowed, by which it appears that Peter Wyatt died in Lowndes County, in 1833, in possession of the slave in question, and owned him; that Mary Ann E. Wyatt, his widow and relict, with one William N. Mock, her brother, administered on the estate, and continued in said administration up to March, 1852, when they were removed from said trust, and the plaintiff below was appointed administrator *de bonis non* of said estate.

The defendant thereupon proved that said administrator and administratrix in chief obtained from the Orphans' Court of Lowndes County the following orders, to-wit:

"Ordered by the court that the administrators of the estate of Peter Wyatt, deceased, have leave to sell all the perishable property of said deceased, upon a credit of at least six months.

"Ordered by the court that the administrators do make a full and true inventory of said sale, and return the same to this court the first term thereafter.

"Ordered by the court that said administrators give a notice of said sale, by advertising at three or more public places in said county, at least thirty days previous thereto, of the time and place of said sale.

"Ordered by the court that the administrators of the estate of Peter Wyatt, deceased, have leave to sell this present crop of cotton, at public or private sale, as they may deem most advantageous to said estate of said deceased."

"The defendant further proved that on the day of February, 1834, said administrator and administratrix, after having duly advertised the sale of the personal property of said Peter Wyatt, did sell, at the late residence of the said Peter, to the highest and best bidder, all the personal property belonging to said estate, including the slaves, the boy in controversy with the rest; that there were a great many persons present, the property cried and brought full prices. The property was sold

on a credit until the 1st of January, 1835. When the property was put up, the terms of sale were proclaimed, and the boy in question was bid off by Mrs. Wyatt, the administratrix.

"The defendant further proved that, soon after the sale of said property, to-wit: on day of March, A. D. 1834, the said administrator and administratrix made out and returned to said Orphans' Court a sworn sale bill of all of said personal property, which sale bill included an account of the sale of Jeff and all the other slaves of Peter Wyatt; also an account of the sale of the cotton; said sale bill also contained an account of the prices at which the various articles and pieces of property were sold, and who were their respective purchasers. Said sale bill being reported to the Orphans' Court aforesaid, at its March term, 1834, the following orders were made at that term on the minutes of said court: 'Now, at this term of the court, Wm. N. Mock, one of the administrators of the estate of Peter Wyatt, deceased, came into court, and made a return of a sale bill of the property of said deceased; whereupon it is ordered by the court that the clerk enter upon record the sale bill in the inventory book kept for that purpose; it is further ordered by the court that the clerk file in his office the original sale bill as an office document.'

"The defendant introduced proof tending to show that soon after the said sale said Jeff went out of the possession of Mrs. Wyatt into the possession of a person to whom Peter Wyatt was indebted, and ever afterwards continued in the possession of that person and those claiming under him, up to the time of this trial, a period of eighteen or nineteen years. The record of the administration of the said Wm. N. Mock and Mrs. Wyatt, being produced, showed no act of theirs after the proceedings of said March term, 1834, above copied; they never made any settlement of their administration."

The court charged the jury as follows:

1. That the orders above copied conferred no authority on the administrators in chief to sell the slaves, and that such sale was void;

2. That the orders above copied, confirming the sale of the slaves, did not legalize the sale;

3. That said sale being made by the administrators in chief,

they were estopped from suing for and recovering the slaves, and the statute of limitations did not begin to run until the appointment of the administrator *de bonis non* of the estate;

4. That, even if the jury should find that the slave Jeff was sold publicly under said orders; that the sale was fair and for a full price, and said slave was applied to the payment of a debt of the estate of said Peter Wyatt, that does not defeat the plaintiff's right of action, unless those who are interested in the estate elect so to regard it.

To all of these charges the defendant excepted, and asked the court to charge the jury:

1. That, if they believed all the evidence, then the plaintiff cannot recover; which charge the court refused to give, and the defendant excepted.

2. That, if they found from the evidence that said slave was sold publicly to the highest bidder, on a credit from February, 1834, till the 1st of January, 1835, under the orders above copied, that the sale was fair and for a fair price, that the sale was reported to the Orphans' Court, and the orders above copied were then and there passed by the Orphans' Court, and that said slave ever afterwards remained out of the possession of the administrators, then the right of the slave is divested out of said estate, and the plaintiff cannot recover. This charge the court refused, and the defendant excepted.

The charges given and the refusal to charge as requested are now assigned for error.

WATTS, JUDGE & JACKSON and GEO. W. STONE, for appellants.

T. WILLIAMS, *contra.*

GIBBONS, J.—The first charge of the court to the jury was, that the several orders above set out did not confer upon the administrators in chief authority to sell the slaves, and that such sale was void; meaning, we presume, that such sale was void as against the plaintiff in the action, for as against the administrators in chief it was not void, as is shown in a subsequent charge of the court, where it states that the administrators in chief would be estopped by their sale from asserting a title in their names. Giving to the charge this interpretation,

the question is, whether the court was or was not correct in its charge.

The sale seems to have taken place in February, 1834; and the act under which the orders were made is as follows, to-wit: "It shall not be lawful for any executor or executors, administrator or administrators, guardian or guardians, to take the estate, or any part thereof, of any testator or intestate, at the appraised value, or to dispose of the same at private sale, except where the same is directed by the will of the testator.—But in all cases where it may be necessary to sell the whole, or any part, of the personal estate of any testator or intestate, it shall be the duty of the executor, administrator or guardian, to apply to the Orphans' Court of their county for an order of sale, and obtaining the same, to advertise the time and place of such sale in three or more public places in the county, at least thirty days previous to the day of sale, and then and there proceed to sell the same at public sale to the highest bidder, giving at least six months credit; the purchaser giving bond with approved security."—Clay's Dig. 223 § 13. We say the order of sale was made under this act, because this is the only act upon the subject under which it could have been made.

The term "perishable property," in its most enlarged sense, would mean all personal, as distinguished from real property; whilst in its most restricted sense, it would only mean such personal property as had in itself the elements of destruction or decomposition, as for instance, fruits, or such productions from the labor and skill of man as are ephemeral in their existence, or evanescent and changeable in their value. In this latter sense, it would ordinarily comprehend but very few articles belonging to an estate. If we apply to the orders of the court, on which the charge under discussion is predicated, the most enlarged sense of the term, it is clear that it did confer on the administrators all the authority necessary for the legal disposition of the property. If, on the other hand, we apply to them the most restricted sense, then it is equally clear that the order would not confer such authority. It does not appear from the present record whether there was belonging to the estate, at the time that the orders were made, any property that would properly range itself under the latter of the above definitions of the term perishable property; all that does apppear is, that all the

personal property of the estate was sold, and the negro in question with the other negroes of the estate.

It will be observed here, that in reference to the effects of estates, our statute has given no definition of the term perishable property; nor is there any act authorizing the Orphans' Court to make any order in reference to that particular species of property. The term, it is true, has received a legislative interpretation in reference to the attachment laws of the State, and it is there said to be that "which is likely to waste, or be destroyed by keeping."—Clay's Digest 56 § 8; but whether the legislature would apply the same meaning to the term, when used in reference to the estates of deceased persons, we know not, as it has not as yet thought proper to give it any definition whatever as applied to such estates. The term, then, as employed in the order of the court, could have no reference to any technical meaning given to it as applied to estates in the hands of personal representatives, as the term then had no legislative technical meaning, nor has it any as yet, as applied to such estates. It is clear that, if the statutes had defined what should be considered as perishable property as applied to such estates, or even if the term was known to our law at all in a legislative technical sense, as applied to the general property of decedents, then the term, as used by the court in the order above referred to, would have to receive such statutory interpretation. But in the absence of any such definition, what rules of interpretation shall we resort to in order to ascertain the meaning of the term as used by the court, or to comprehend in what sense the court making the order, and the parties acting under it, understood it? I confess I know of no better rule under such circumstances than to let the parties themselves be the interpreters, by showing what they themselves understood by it. The moment we adopt this means of ascertaining the meaning of the orders, there is no longer any mystery. We find that under the order the administrators proceeded and sold the whole of the personal property of the estate, precisely as if the order had been to sell the personal instead of perishable property.

The order, on its face, was in all respects as if it was intended to mean the personal property generally, and to be strictly a statutory order. The only word in the whole order that prevents it from being strictly such, is that *perishable* is used in-

stead of *personal* as a prefix to the word property. The sale is made, and an account thereof returned to the court, according to the order; and the account passed, and the proceedings of the administrators sanctioned and approved, as much as it was in the power of the court so to do, precisely as if the order had been to sell the personal instead of the perishable property.—Under these circumstances, we think we are authorized to say, that such was the meaning of the order under which the sale was made. That such was the understanding of the parties acting under the order, and of the court itself making it, we think clear; and in the absence of a statutory definition of the term perishable property, as applied to the estates of decedents, by which the term has to receive a strict statutory technical meaning, we see no reason why we should not give to the order now the same interpretation that the court making it and the parties acting under it gave it at the time that it was made.—From this view it follows, that the court erred in this charge as given to the jury, as the orders of the court under which the sale was made were ample to confer upon the administrators in chief the authority to sell the property and pass the legal title thereto. This we regard as decisive of the whole case, and therefore do not deem it necessary to consider the remaining questions raised by the record.

The judgment of the court below is reversed, and the cause remanded.

BRANCH BANK AT MOBILE *vs.* FRY.

1. Assumpsit lies in favor of the landlord against a stranger for rents received by the latter from the tenants under an assertion of title in himself.
2. If the tenant pays over rents to the mortgagor after the law day of the mortgage, before notice of any claim by the mortgagee, the payment is effectual against the latter; nor does the mortgage constitute any objection to a recovery by the mortgagor against one who has wrongfully received the rents under an assertion of title, when it is not shown that the mortgagee has asserted any claim to the fund.

8. The heir at law may sue for and recover rents accruing after the death of his ancestor, whose estate has been declared insolvent, if neither the administrator nor creditors interpose any obstacle.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. JOHN A. CUTHBERT.

ASSUMPSIT by William Fry, an infant who sues by his next friend, against the plaintiff in error, for the "use and occupation of premises belonging to plaintiff in the City of Mobile; also for money received by defendant for the use of plaintiff, for money due upon an account stated, and money due for interest." The case was tried on the following agreed statement of facts:

"William W. Fry, the father of plaintiff, and George H. Fry were owners in common of the premises herein referred to, in 1835, and continued said owners, and in possession by their tenants, until the death of William W. Fry, which took place in 1839. Before the death of said Fry, the defendant in this suit recovered a judgment against him in the County Court of Mobile, for $, on which execution was duly issued, and was levied on said Fry's interest in said premises before his death; but the execution was returned without a sale, and no further proceedings were had under said levy until 1844, when a *venditioni exponas* was issued, directed to any sheriff, &c., and was delivered to J. L. Marsh, the marshal for the said Bank, who, by virtue thereof, proceeded to sell William W. Fry's interest in said premises, and the same was purchased by the Bank, who received a deed therefor from said marshal in March, 1844.—After this sale, the defendant, claiming to have the title and interest of said William W. Fry in the premises, and finding Foster & Battelle and others in possession as tenants of the former owners, George H. Fry *et al.*, threatened to dispossess said tenants, unless they would pay rent to the defendant, to the extent of W. W. Fry's interest in the premises; and thereupon said tenants paid a moiety of the subsequent rents of the premises to the defendant, until the property was placed in charge of a receiver, appointed by the Court of Chancery of Mobile at the instance of certain persons who held an unsatisfied mortgage on it, executed by W. W. Fry in 1835. The

amount of rents received by the defendant from the tenants, between September 4, 1844, and April 12, 1847, on which day the last was received, was $1088 12. Before the purchase by the defendant, the estate of said W. W. Fry had been declared insolvent. W. Fry, the plaintiff in this suit, is the only child and heir of said W. W. Fry. An action of trespass *quare clausum fregit* was brought by plaintiff against defendant, to recover this same money, in this court, in which suit judgment was rendered for defendant, and on writ of error the same was affirmed, at June Term, 1849. See case reported in 16 Ala. 282.

"If the court should be of opinion, on the above statement, that the plaintiff is entitled to recover, judgment is to be rendered, as on verdict, for the amount above specified and interest; if otherwise, then for the defendant: with liberty for either party to turn this case, with the opinion of the court, into a bill of exceptions for the decision of the Supreme Court. It is also agreed that the mortgage was forfeited before said rents accrued, and that all judgments in favor of said Bank against said W. W. Fry are satisfied."

On these facts, the court rendered judgment for the plaintiff; from which judgment the defendant appealed, and now assigns it for error.

JOHF T. TAYLOR and A. BOYKIN, for appellant.

P. PHILLIPS, *contra.*

CHILTON, C. J.—It is very clear that the Bank is not entitled to this money upon any supposed ground of retainer as a creditor of the estate of W. W. Fry, deceased, for the record shows that its judgment against said Fry has been satisfied, and states no other indebtedness. We must intend, also, that the demand now sued for constituted no part of the satisfaction of that judgment, as the bill of exceptions taken at the instance of the Bank, and which therefore must be construed most strongly against it, fails to show that the money sued for in this action was credited upon its demand.

The money received by the Bank from the tenants of Fry, although obtained upon the assertion of title to the land, and under the belief that such title was valid in law, was neverthe-

less wrongfully received, as it is conceded that the Bank, by the purchase at the marshal's sale, acquired no title to the land. It stands, then, in the atitude of one who induces the tenant of the real owner of the land to pay him rent, upon a threat of expulsion from the premises, by reason of an alleged valid title which is in fact worthless; and having obtained the money upon a claim of right which turns out to have no foundation in fact, it holds the fund for the person who, in justice and equity, is entitled to it. No question of adverse possession properly arises in this case, since the Bank was never in possession, in legal contemplation. Certainly, the payment of rent by the tenants of the owner, under a misapprehension of their liability, caused by the assertion of title on the part of the Bank when it in truth had none, could not amount to an attornment on the part of such tenants, thus placing the Bank in possession. Occupancy, it is true, under *bona fide* claim of title, creates an adverse possession; but the reception of rents from one rightfully in possession, in subordination to and terre-tenant under the true title, by a false assertion of ownership, however innocently made, is quite a different thing. It confers no right to the money thus received, and the party collecting it must be regarded as holding for the person who, in justice and equity, is entitled to it. The tenants remained the tenants of the rightful landlord, and if the Bank had sued them for the rent, after the payments which they had made to it, we entertain no doubt but that the law would have allowed them to show that such previous payments were made under a mistake. If such were not the law, the tenants, who may have acted in never such good faith, might have been compelled to pay the rent twice, as it is certain their real landlord could have recovered against them. This being the case, and there being no controversy as to the invalidity of the title of the Bank, it is clear that it is under an equitable obligation to pay over this money to the rightful landlord, for the protection of the tenants from whom the same was obtained. The action of asssumpsit, we think, may well be sustained.

2. But it is urged, that the rent enured to the benefit of the mortgagee, whose mortgage was forfeited before the rent was received by the Bank. Conceding that the mortgagee had the right to enter after the law day, and consequently to claim rents from those who should thereafter occupy the land, yet, if the

tenants paid the rents before notice of any claim on his part, such payment would be effectual as against the mortgagee.—Mansony *et al.* v. The United States Bank *et al.*, 4 Ala. 735.—In this case, the mortgagee has asserted no claim to the fund, and from aught that appears in the bill of exceptions, the mortgage demand has been fully paid. The mortgage, therefore, constituted no objection to the recovery.

3. But it is said, the estate of W. W. Fry having been reported insolvent, it is incumbent on his personal representative to see that the land, with its issues, should be applied to the payment of the debts, and that consequently the heir can take nothing. The rule upon this subject was correctly laid down by this court in Masterson v. Girard's Heirs, 10 Ala. 60, in which case it was held, that, although under the statutes the administrator had power to rent the real estate of his intestate, and had power to recover rent due on the demise of the decedent, yet, until he asserts this power by notice to the tenant or by actual suit, the heir may sue for and recover the rent falling due after the death of his ancestor; and we may add, although the estate be insolvent, yet, if neither the administrator nor creditors of the estate interpose any obstacle to a recovery, we see no reason why a stranger should be allowed to object that a party on whom the legal title is cast by descent should not be allowed to recover.

It was said in the argument that the Bank was a creditor of the estate; but we repeat that the record fails to show this, and what does not appear must be regarded as though it did not exist.

It follows from what has been said, that the judgment of the Circuit Court must be affirmed.

MARTIN *vs.* HIGGINS.

1. When a defendant, against whom a judgment is rendered by a justice of the peace, removes the case by appeal to the Circuit Court, he is regarded as the actor in the subsequent proceedings, and is held to be constantly in court.
2. The notice to the appellee, required in appeal cases from justices of the peace, is intended solely for the benefit of the appellee, and the appellant cannot complain on error that it was not given.
3. "Plaintiff claims $50, for work and materials," held a sufficient statement to sustain a judgment by default and writ of inquiry.
4. The action of the inferior courts on motions for new trials, is not revisable on error.

ERROR to the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THE facts are these: On the 10th September, 1852, Higgins obtained a judgment against Martin, before a justice of the peace, for the sum of $50 and costs. On the 13th of that month Martin took an appeal to the City Court, which commenced its session on the second Monday in October, 1852.—During that term, Higgins appeared by his counsel, and filed a statement in the following words: "Plaintiff claims $50 for work and materials." Martin having failed to appear, a judgment by default was rendered against him, and a writ of inquiry was awarded returnable immediately. A jury was empannelled, who assessed the plaintiff's damages, and the court gave judgment final for the amount of the verdict.

On the last day of the term Martin appeared, filed affidavits, and moved for a new trial, which the court refused. To the ruling of the court on this motion Martin excepted, and the court signed and sealed a bill of exceptions, setting forth many facts, which it is unnecessary to note, as they are not looked to in passing on the errors assigned.

Martin here assigns for error:

1. That the justice of the peace did not return the appeal and papers in the case into the City Court until after the commencement of the session at which the judgment was rendered;

2. Because no notice of the appeal issued to the appellee until after the court commenced its session;

3. Because the statement of the cause of action is insufficient;

4. Because the court overruled the motion for new trial;

5. The court erred as set out in the bill of exceptions.

C. W. Rapier, for plaintiff in error.

LIGON, J.—There is no error in this record of which the plaintiff in error can rightfully complain.

1. The first assignment of error is predicated on nothing which is disclosed by record, except it be in the affidavit of the plaintiff in error, filed in aid of his motion for a new trial in the court below, and introduced into the bill of exceptions as a part of the evidence of surprise on which he rested that motion.—The record taken from the minutes of court, which must be held to import absolute verity, is in the regular form of records in cases of appeal, and does not show that the case was docketed in or brought up to the City Court during the term at which it was tried. Even if it were otherwise, the plaintiff in error could not be allowed to complain of it. The case was brought into the City Court on his appeal; and although, under our statute, the position of the parties remains unchanged on the docket, he must be regarded as the actor, and held to be constantly in court. Indeed, these very affidavits show he was so, until his counsel abandoned him when his case was called, and he was not personally present.

2. The statute requires that the appellee, in cases brought by appeal from a justice of the peace, shall have notice of the appeal at least five days before the term of the court to which it is returnable, or the cause shall not be tried at the first term. But this is a provision solely for the benefit of the appellee. If he appears without it, he waives it, and would not be allowed to continue the cause for the want of it; and if he so appear and insist on a trial, the appellant would not be heard to urge the want of it as a ground for continuance. He cannot, therefore, be heard to complain of it on error.

3. The statement of the cause of action in this case is neither so full nor so formal as such statements usually are, but still

we think it sufficient to enable the jury, who were sworn to assess the damages under it, to understand the nature of the plaintiff's claim and the foundation of his demand. It is a sufficient informal count in *assumpsit*, for work and labor done and materials furnished by the plaintiff for the defendant, to the amount of fifty dollars, which is claimed by the plaintiff. Great strickness is never required in the pleadings in such cases, and substance, not form, is sought for. The statement, and the verdict founded upon the proof admitted under it, are sufficient to sustain the final judgment of the court; and the statement alone will sustain the first judgment by default, and the writ of inquiry awarded on that. The plaintiff in an appeal case, in which the amount in controversy exceeds twenty dollars, and the defendant does not appear, may proceed to judgment in the same manner as in cases of original jurisdiction in the Circuit Court.—Bevin v. Goodman, Minor's R. 90.

4. The fourth assignment of error cannot be examined in this court, for it has long been settled, beyond all controversy, that the Supreme Court will not revise the action of inferior tribunals on motions for new trials.—Lecatt v. Stewart, 2 Stewart 474; 3 Stew. 244; 2 Por. 182; 10 Ala. 538.

It results, from what has been said, that the record is free from error, and the judgment is affirmed.

HOLSTON *vs.* HOLSTON.

1. A bill for a divorce on the ground of adultery must allege the name of the person with whom the adultery was committed, or the fact that it is unknown to complainant; but if the defendant answers the bill, without raising any objection on account of the want of such an allegation, he will be held to have waived it.
2. A divorce *a vinculo matrimonii* was granted to the wife, on the ground of abandonment and adultery on the part of her husband, when the evidence showed that she had separated from him before the consummation of their nuptials, because she had just reasons to apprehend that he had another wife then living; that he consented to the separation at the time, and promised to produce sufficient evidence to remove her suspicions; that

he entirely failed to produce such evidence, and showed no exertions to obtain it; and that he led a vagabond, roaming life, and committed adultery with different women, with one of whom he lived four months.

ERROR to the Chancery Court of Barbour.

Heard before the Hon. J. W. LESESNE.

THIS bill was filed by the defendant in error, Nancy Jane Holston, by her next friend, for a divorce *a vinculo matrimonii* from her husband, who is the plaintiff in error, on the alleged grounds of voluntary abandonment for three years and abandonment and living in adultery with another woman. The defendant answered, denying the allegations of the bill, alleging that the complainant had voluntarily abandoned him for three years, and praying that his answer may be taken as a cross bill, and that a divorce *a vinculo* may be rendered in his favor. The opinion states such portions of the evidence as are material to the understanding of the case. The Chancellor decreed a divorce in favor of complainant, and his decree is here assigned for error.

WILLIAMS & COCKE, for plaintiff in error:

1. The proof is entirely insufficient to show an abandonment of the defendant by the plaintiff in error for three years next before the filing of the bill. Giving all the evidence adduced by her its utmost weight, it can not be allowed to go farther than to establish the fact of a living apart by mutual consent; and this is not sufficient to authorize a divorce.—Jones v. Jones, 13 Ala. 145; Gray v. Gray, 15 Ala. 779. Declarations, &c., are not evidence.

2. As to the ground of adultery, &c. The allegations of the bill, in failing to state the time, place and person, are insufficient to warrant the decree, conceding the fact to be made out by the proof.—2 Paige 108; 1 Barb. 318; 3 Edw.; 4 Porter 467.—But if it were otherwise, the proof is insufficient. Excluding the illegal and inadmissible evidence, in accordance with the decision in Richardson v. Richardson, 4 Por. 467, the allegations are not sustained by evidence.

J. BUFORD, *contra*, contended that complainant had reasonable grounds for apprehending that her marriage was void, and

was justifiable in acting upon those apprehensions and temporarily separating from her husband; and that this did not estop her from seeking relief against his subsequent abandonment and adultery. He cited Levett's case, 1 East's C. L. 274; 2 *ib.* 16; Houlston v. Smyth, 11 E. C. L. R. 65, 66; 4 Por. 467.

GOLDTHWAITE, J.—The bill in the present case seeks the dissolution of the marital ties on two grounds: first, that the defendant has abandoned the complainant with the intention of abandonment for the term of three years; and, second, that he has abandoned the complainant and lived in adultery with another woman.

In relation to the second ground the bill is unquestionably defective, in not alleging the charge with a sufficient degree of certainty. All the authorities agree, that in making an allegation of this nature, the name of the woman should be given, or an excuse rendered for not doing so by the averment that the name is unknown.—Germond v. Germond, 2 Johns. Ch. Rep. 347; Burn v. Burn, 2 Paige 448; Kane v. Kane, 3 Edw. 389. Had the objection been made, it must have been sustained; but it was not taken, and is made for the first time in this court.—The case of Hill v. Hill, 10 Ala. 527, is decisive of the principle so far as this question is concerned, and under the influence of that decision, we must hold that, by answering the bill and failing to raise the objection below, it has been waived.

The case, then, is one which depends entirely upon the evidence; and while there may be some doubt, as to whether the bill can be sustained upon the first ground, we think the second is sufficiently made out.

There are certainly some decisions to be found, which countenance the idea that the separation of the wife, without just cause, would bar her right to a sentence of divorce for the adultery of the husband.—Wood v. Wood, 5 Ired. 674. But this is not the doctrine of the English courts, (Sullivan v. Sullivan, 2 Add. 299,) nor has it, in any case that has been brought to our notice, received the sanction of this tribunal. It is, however, wholly unnecessary to discuss this question, as we are of the opinion that the separation of the wife, under the circumstances, was perfectly proper. The evidence discloses that, from the reports in circulation, and from a letter written to the

brother of the defendant, she had just apprehension to believe that at the time of her marriage to him he was the husband of another woman. The mere statement of these facts is sufficient, and we will not pause to show that, under such circumstances, the separation of the wife was proper and commendable. The defendant himself consented to a separation with this view, and at a subsequent day apparently saw the propriety of continuing it, until these doubts were cleaned up, and not only consented to it himself, but promised to produce the proofs which would be sufficient to remove these suspicions from her mind. There is no evidence in the record, which shows that he ever adduced these proofs—none that he made the slightest exertion to obtain them; and from his conduct, as detailed by several of the witnesses who were examined, we can come to no other conclusion than that he became totally indifferent whether the suspicion was removed or not. The evidence goes further, and shows clearly that, after making this promise, which he failed to fulfil, he led a vagabond, roaming life, committing adultery at various times with different women. This may not be sufficient to sustain the allegations of the bill, but it shows at least how lightly he was disposed to regard the marriage relation, and prepares the mind to be convinced with a much smaller degree of testimony than it might otherwise require. One of the witnesses swears that he kept one woman for four months. The permanent and continuous intercourse with the female referred to, satisfied the requisitions of the statute in relation to the living in adultery, and the abandonment was sufficiently shown by the failure on the part of the defendant to use any exertions to remove the suspicions which first induced the separation on the part of the complainant, united with gross and repeated violations of the marriage obligation as shown by the evidence. No man could have pursued this course, who was not utterly indifferent to the obligations of the relation which he had contracted and entirely willing to be discharged from them. There may not have been an intention to abandon when the separation first took place, and for that reason we do not think the first ground sufficiently established; but that it subsequently existed in his mind, we cannot doubt.

The decree of the Chancellor is affirmed, with costs, against the plaintiff in error.

TANKERSLEY *vs.* CHILDERS ET AL.

1. Where there has been a conversion of property owned by several tenants in common, they may all waive the tort and join in assumpsit, or each one may bring a separate action for his interest without joining the others.
2. In assumpsit for money had and received, plaintiff must show some certain amount to which he is entitled; but if the evidence furnishes certain data from which, by an arithmetical calculation, the jury may ascertain the amount to which he is entitled, it is sufficient.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. ROBERT DOUGHERTY.

ASSUMPSIT by the appellees, James Childers, David W. Childers and Paschal W. Childers, against Felix M. Tankersley. The action was brought to recover plaintiffs' portion of the proceeds of certain bales of cotton, which the defendant, who was a constable, had seized and sold under an execution against David Childers: the declaration contained the common counts.

ELMORE & YANCEY, for plaintiff in error:

1. This action is for money had and received, and before the plaintiffs are entitled to recover, they must prove their claim to some specific sum.—Chitty on Contracts [6 ed.] 603, 604, 609.

2. The defendant, Tankersley, as constable, is entitled to retain the share of David Childers in the sum for which the cotton sold. But it is incumbent upon the plaintiffs to prove what share they are entitled to of that sum.—Hill v. Gibbs, 5 Hill 56.

3. The plaintiffs rest their claim on a contract, by virtue of which they occupied the lands of one Smyth, and, together with David Childers, made the cotton which Tankersley sold. By that contract Smyth was "to have one fourth of all the products of said lands, rented as aforesaid, after deducting all expenses for bagging, rope and hauling to market, which was to be in payment and satisfaction of the rent." The share of each party to this contract depends upon the amount of those

expenses. There was no proof of what those expenses were, and consequently the proof made by the plaintiffs did not entitle them to the charge given by the court, and defendant was entitled to the first and second charges asked for.—Hill v. Gibbs, 5 Hill 56.

4. Waiving the question as to the character of the contract as between the Childers and Smyth, as being immaterial in this point of view, it is clear that, as among themselves, the Childers were tenants in common of the products of the lands, or of the proceeds of the products. The levy upon and sale of the cotton by the constable, as property of one of the tenants in common, was a conversion of the cotton by the constable, and a tort, for which the other tenants in common could bring trover; or, waiving the tort, they might affirm the sale, and sue for money had and received.—Upchurch v. Norsworthy, 15 Ala. 705; Crow v. Boyd's Adm'r, 17 Ala. 51; Tankersley v Smyth, 20 Ala. 212. The conversion of the cotton by the constable, and the affirmation of the sale by the parties in interest, operated as a severance of the interests of the tenants in common; and therefore there was a misjoinder of parties in the action.—Parminter v. Kelly, 18 Ala. 716; Tankersley v. Smyth, 20 Ala. 212; 2 Caines 166. The misjoinder of plaintiffs, in actions *ex contractu*, may be taken advantage of at the trial, under the general issue.—1 Phil. Ev. 210; Cowen & Hill's Notes, 515, 516. Therefore the charge given was wrong, and the first and second charges asked for was improperly refused.

5. If, however, this contract is to be viewed as decided in Tankersley v. Smyth, 20 Ala. 212, viz., as creating a tenancy in common of the cotton among the Childers and Smyth, and it shall be held that the sale by the constable did not operate as a severance, then Smyth should have joined in the action.—Hill v. Gibbs, 5 Hill 56; Lane v. Dobyus, 11 Missouri, 105-6-7; Gilmore v. Wilbur, 12 Pick. 120; Fearer v. Spear, 2 Bibb 385. This being an action *ex contractu*, the non-joinder of plaintiffs need not be pleaded in abatement, but may be taken advantage of at the trial under the general issue.—1 Phil. Ev. 210; Cowen & Hill's Notes, 515, 516.

WATTS, JUDGE & JACKSON, *contra*, cited Smyth v. Tankersley, 20 Ala. 212, and contended that it was conclusive of this case.

PHELAN, J.—The action was *assumpsit* by three of the Childers to recover of the defendant their portion of the proceeds of the cotton which was sold by him as constable under an execution against David Childers, who, together with one Smyth and the plaintiffs, was a tenant in common of the cotton which he sold.

The right of the plaintiffs to waive the tort, the conversion, and sue in *assumpsit*, is not denied. But it is insisted by plaintiff in error, that in this form of action all the parties in interest must join in action, and that they cannot sue if any number less than all join as plaintiffs. This question of the right of any one tenant in common to waive a tort, and sue separately in *assumpsit*, was considered in the case of Smyth v. Tankersley, 20 Ala. 212, when we held that such right existed. The general doctrine on this subject of non-joinder of plaintiffs, or the right to sue separately where a tort is waived, and parties sue in *assumpsit*, has since received a careful examination anew in the case of Smith's Ex'rs v. Wiley, 22 Ala. 396. The court in that case arrive at the conclusion, as the result of sound reason and the best authorities, that when a conversion has been committed against several, all the parties in interest waiving the tort may join, if they like, in an action of *assumpsit;* but, that they are under no legal compulsion to do so, for that any number less than all, or any separate one, may bring *assumpsit* for his or their share or interest without joining the rest. See the opinion of C. J. Chilton in that case, and the authorities there cited.

The next objection urged by plaintiff in error is, that the proof does not show any certain amount which the plaintiffs below were entitled to recover, and for which the jury could render a verdict; and that, therefore, the second charge requested by defendant below should have been given.

The principle for which plaintiff in error contends is conceded, that unless a plaintiff shows, in an action for money had and received, some certain amount to which he is entitled, he must fail. But we do not see how it can be contended, that the case of the plaintiffs below, as presented by the record, labors under this defect.

The bill of exceptions shows that the following facts were proven: That the plaintiffs and David Childers cultivated a

piece of land belonging to one Smyth, and were to give him one fourth of "all the products of the land as rent, after deducting all expenses for bagging, rope and hauling the cotton to market." The three bales of cotton levied on by defendant as a constable, by virtue of an execution against David Childers, were a portion of the crop or products of this land. This cotton, it was proven, weighed 2516 pounds, and sold for 9 cents per pound. There was no proof as to what was the expense of rope, bagging and the hauling to market of these three bales, but evidence was offered conducing to show that James B. and David W. Childers, two of the plaintiffs, had agreed to furnish Smyth's part of the rope and bagging and hauling to market, and to receive a credit for the same on a blacksmith account he held against them; and it was shown that they had furnished the rope and bagging and hauling for Smyth under this contract. This proof, if believed by the jury, (and the court put the charge in that way,) did furnish certain data upon which the jury were enabled to render a verdict; for it went to show that Smyth was entitled to one fourth of the entire proceeds of this cotton, and the other parties the other three fourths.—The jury, therefore, had only to make a calculation of the value of the cotton, deduct one fourth for Smyth, one fourth of the balance as the portion of David Childers, which the defendant was entitled to retain, and this would leave a sum certain, namely: the other three fourths of what remained after deducting Smyth's part, as the share to which the plaintiffs were entitled. In view of this proof, the objection of plaintiff in error is not well founded.

The foregoing observations cover the only assignments of error which have been urged, and as we find no error in the record, the judgment below is affirmed.

REESE *vs.* REESE.

1. The statute which allows a bill for divorce to be filed in the chancery court of the county in which the complainant resides, is remedial and cumulative, and does not take away the right to file it in the county of the defendant's residence.
2. Every act of cruelty complained of need not be alleged in the bill with circumstantial particularity; one or two specifications will be sufficient, and the evidence may make out others under the general charge.
3. Where the wife continues to live with her husband for two years after the commission on his part of an act of gross violence, this will not amount to condonation, nor estop her from afterwards complaining of it.

ERROR to the Chancery Court of Lawrence.

Heard before the Hon. D. G. LIGON.

THE bill in this case was filed by Sarah Reese, by her next friend John M. Eldridge, against her husband, John C. Reese, who is the plaintiff in error, for a divorce *a vinculo matrimonii*, on account of cruel and inhuman treatment on his part.

The bill alleges that in January, 1831, she intermarried with the defendant, when he had a small amount of property, and she had considerably more than he had, which she brought to him. The bill then details a long series of indignities, cruelties and oppressions, continuing for a long series of years, until at last it became intolerable, and she was forced to abandon him. The bill alleges this continuous ill-treatment up to the time of her abandonment, but it also specifies certain times when his conduct to her had been more outrageous than at other times, and amongst others, one time is specified about two years before she abandoned him.

The bill prays that the marriage be dissolved *a vinculo*, and that a reasonable allowance be made to her out of the property as alimony for her support and maintenance.

The defendant answers the bill, denying all cruel treatment, and casting the whole blame of their unpleasant and disagreeable life upon the complainant, and by his answer presents himself before the court as blameless, whilst the complainant is anything but an innocent or an injured person.

The bill is demurred to, because there are no specific acts of cruelty alleged after a certain date specified in said bill, about two years before she abandoned him, and when his conduct was alleged to have been more than ordinarily brutal and cruel. The answer also states, by way of plea, that the complainant did not reside in the county of Lawrence, where the bill was filed, but in the county of Madison.

The answer further alleges, by way of plea to all that part of the bill charging cruel treatment before the 15th of September, 1846, that on that day all prior offences were condoned, and consequently cannot be alleged against the defendant.

Much proof was taken in the cause, too much to be repeated in this statement. The allegations of the bill are all substantially established by the clearest and most undoubted testimony.

The decree of the Chancellor was as follows:

"This cause is submitted on bill, answer, plea, demurrer and proof, for final decree. The bill is filed for divorce and alimony. The divorce is claimed on the allegation of cruel, inhuman and barbarous treatment on the part of the husband. The causes of demurrer are: first, that Mrs. Reese, the complainant, was at the time of filing the bill a resident of a different chancery district from the one in which the bill was exhibited. The statute which allows complainants in cases of divorce to file their bill in the courts of the district in which they reside, is remedial in its character, and cumulative of former remedies. It cannot be so construed as to take from complainants any pre-existing right. Jurisdiction in chancery, as well as at law, before the passage of that act, was fixed and regulated by the residence of the defendant, when he was a citizen of this State. This bill distinctly charges that the defendant resides in Lawrence County, in which it is filed. The demurrer, therefore, so far as it depends upon this cause, is overruled.

"The other ground of demurrer, which, with the one already disposed of, forms the principal matter of both demurrer and pleas, is, that the bill charges no specific acts of inhumanity, cruelty and barbarity after the 15th day of September, 1846, but that the charges are vague and general. On examining the bill, I find that the charges of cruel, inhuman and barbarous treatment are made to extend in general terms to the day of the final separation, and a few out of many instances are spe-

cifically charged, some without date, and one with the very day on which it occurred. I do not think it necessary to allege every act of cruelty complained of with circumstantial particularity; one or two specifications will be sufficient, and proof may make out others under the general charge. In a lapse of eighteen years of matrimonial strife, such as is shown to have existed between these parties, it would require a voluminous bill indeed to charge every act of violence and abuse. The demurrer is, therefore, overruled.

"The pleas, except so far as relates to the question of condonation, are not sustained, and are disposed of in the examination of the demurrer.

"As to the question of what will amount to condonation of the wrongs and injuries sustained by the wife, when it has to be inferred from the acts of the wife, it would be exceedingly difficult to lay down any fixed general rule, which should govern in all cases. The wife who is timid and fearful, shrinks with horror and dismay from the odium which attaches to a separation from her husband, and becomes the patient martyr of his tyranny and brutality, rather than seek peace in separation, unless a time should arrive in the history of her sufferings, when, justified by the opinion of the world, and sustained by the counsel of friends, she might seek freedom in abandoning him. Such patient endurance would not amount to condonation.

"The wife of a dissipated and drunken husband, who has become the mother of his children, and the subject of his cruelty and inhumanity, will patiently bear her wrongs, under the hope, sometimes well founded but often delusive, of being able to reform him. Her forbearance in this respect, influenced as it is by the most praiseworthy of all motives, should not be construed into condonation of the brutal wrongs inflicted upon her, if, when she despairs, she seeks freedom in flight from the home of her misery and the scene of her humiliation and suffering.

"In this latter category I am constrained by the proof to arrange the present case, and consequently cannot regard the fact that complainant remained with the defendant for two years after the violence done her on the 15th September, 1846, as such evidence of condonation as will preclude her from now complaining of that wrong, and seeking such relief as the law will warrant for its infliction.

"Under this view of the case, my conclusion is, that the complainant is entitled to the relief she seeks. She is entitled to alimony, and it must be sent to the master, to ascertain what property should be allotted to her. In doing this, he will allot to her one half the slaves in value, leaving the balance of the estate, both real and personal, to the defendant, for himself and son."

The decree was then entered, dissolving the bonds of matrimony between the parties, so far as the complainant was concerned, and the balance of the decree left to abide the master's report.

The errors here assigned are, that the court erred in its final decree.

Wm. Cooper, for plaintiff in error, contended that the proof established a case of mutual misconduct, such as should estop either party from seeking relief; that the decree for alimony, giving the wife one half of the husband's estate, was wrong and not sustained by law, as the parties had one child; one-third would have been ample for her, under the circumstances. He cited Lovitt v. Lovitt, 11 Ala. 763; Quarles v. Quarles, 19 *ib.* 365; Clay's Digest 170 § 8.

R. O. Pickett, *contra*, insisted:

1. That the statute allowing a bill for divorce to be filed in the county of the complainant's residence, was remedial in its character, and cumulative of former remedies; the complainant, therefore, might elect to exhibit her bill in the county of her own residence or in that of the defendant.—Butler v. Butler, 11 Ala. 668; Eldridge v. Turner, *ib.* 1049.

2. That it was not necessary to allege specifically every act of cruelty complained of; that one is sufficient, and other acts properly come out in evidence.—Holden v. Holden, 1 Hag. Cons. R. 458; 23 Law Library 427, and cases there cited; 2 Adams 27; 10 Ala. 527; 1 Hag. Ec. R. 776.

2. That it is legal and meritorious in the wife to be patient as long as possible, and that the facts proven in this case did not amount to condonation on her part.—6 Mass. 147; 1 Johns. Ch. 492; 3 Hag. Ec. R. 629; *ib.* 351; 9 Conn. 233; 4 Paige 460; 1 Hag. 733, 752, 786, 793; 2 Barr 449.

4. That the allegation of "cruel, barbarous and inhuman treatment," was fully sustained by the proof.—Lockwood v. Lockwood, 2 Curtis 281; 6 Bacon's Abr. 500; Moyler v. Moyler, 11 Ala. 620, and cases there cited.

GIBBONS, J.—We have thought proper to set out the decree of the Chancellor in the court below, *verbatim*, because we consider that it is full and conclusive, as to all the questions of law raised by the record. We fully concur in his decision on the various points presented in the case, and have but to add that his decree is in all things affirmed, with the costs of this court and of the court below.—*Vide* 19 Ala. 363, and 20 Ala. 629.

WEAVER'S EX'RS *vs.* WEAVER'S CREDITORS.

1. A decree of the Probate Court on the settlement of an insolvent estate having been reversed on appeal, and the cause remanded, the certificate of the clerk of the Supreme Court to the court below recited the decree of said primary court, "requiring the executors to settle up before the court would hear the contest among the several creditors upon the objections filed, which, being brought before the Supreme Court by appeal, was reversed, annulled," &c.; while the opinion showed that the decree was reversed because "it was not proper to do either just then:" *Held*, that the object of the certificate simply was to inform the primary court what action the Supreme Court had taken on its decree, while the opinion showed the reasons of that action and the course indicated for the future progress of the cause; and that the certificate did not require the court to hear and determine the contests among the creditors before proceeding to a settlement with the executors.
2. When a cause is brought a second time before the Supreme Court, that court will not question the correctness of the law as declared by the previous decision.
3. Where an estate was reported insolvent prior to the passage of the act of 1843, and in progress of settlement, all the subsequent proceedings must conform to the provisions of that act.
4. The retroactive effect thus given to the act of 1843 does not conflict with any constitutional provision, nor does it deprive the executor of any vested right, personal to himself, which he could have insisted on under the previous law; it only works a revocation of his letters testamentary, and changes the mode of proceeding to a final settlement of the estate.

5. Under the act of 1843, a settlement with the executor and the election of an administrator *de bonis non* must be had, before the court can proceed to hear and determine the contests among the creditors; the settlement with the executor and the election of an administrator may precede each other according to the convenience of the parties, with the assent of the court, but no final judgment can be rendered against the executor until his successor is qualified.

ERROR to the Court of Probate of Madison.

JAMES ROBINSON and ROBERT C. BRICKELL, for plaintiffs in error:

There is a manifest difference, if not a direct conflict, between the certificate sent down to the court below and the certified opinion, and again between the certified opinion and the reported opinion.. In this conflict the certificate must govern; it is absolutely conclusive, and the primary court cannot receive any evidence of any kind to contradict it. The law makes it the duty of the clerk of the Supreme Court to certify to the primary courts every final judgment of the Supreme Court.—(Clay's Digest 309 § 14.) The entry on the minutes is the judgment of the court, and not the opinion. The same law that requires the judges of the Supreme Court to write out and file opinions on all material points, requires the same thing of the circuit judges.—(*Ib.* 286 § 6.) Suppose a circuit judge has written out an opinion in a case, giving his reasons for rendering judgment, and the case is reversed on error. Which is reversed, his opinion or the judgment? The judgment certainly; otherwise, a right judgment, if founded on a wrong reason, would be reversed. The minute entry, then, must be the judgment of the court. Here, then, is a sworn officer doing a particular act, which he is required by law to do, and it must import absolute verity.

This certificate informed the primary court that its decree had been reversed and annulled, because it required the executors to settle their accounts before the contests among the creditors were determined, instead of first hearing and deciding the contests among the creditors. None but an ascertained or admitted creditor would have the right to litigate with the executor; and it could not be determined who were in fact creditors, until the contests among those claiming to be such were settled.

Even if the certificate was a total departure from the judgment itself, the primary court would be bound by it, and could not receive any evidence to vary or contradict it; and the Supreme Court, in revising its decision, can only look to the evidence on which that decision was predicated.

If the court should decide this point against plaintiffs in error, and look beyond the certificate, and set it aside as of no force, then it opens up the whole case, and leaves the court at liberty to reconsider the points formerly decided in the case. In this event, the following suggestions are submitted on those points: An executor derives all his rights and powers from the will of the testator. With one or two restrictions, he can do anything before probate that he can after it. The court confers on him no new rights or powers.—1 Williams on Executors 171, 172, 173. Our statutes have somewhat modified the common law, and imposed some new restrictions, but none of those affect the question. The executor holds his office by appointment of the testator, and not by appointment of law; he holds independently of the law, and may rightfully hold in defiance of it: the law cannot deprive him of his office. The will invests him with the property, to be held by him as a trustee for legatees and creditors. This trust is created by a man, and not by law, and therefore partakes of the nature of a contract. The law can no more deprive him of this trust, than it could if it were created by deed; the trust stands upon the same footing as all other trust deeds. Again; by the will, the executor acquires personal rights: 1st, he has a right to retain money due to him by his testator, (Milam v. Ragland, 19 Ala. 85;) 2nd, he has the right to retain for a debt due to him, even though it is barred by the statute of limitations, (Knight v. Godbold, 7 Ala. 304;) 3rd, if he has paid debts with his own money, the assets to that amount become his, (Merchant v. Driver, 1 Saund. 307; 3 John. Ch. 312; Hall v. Chenault, 13 Ala. 710.) If you remove him from his office, you deprive him of each of these rights.—In Shortridge v. Easley, 10 Ala. 520, this court say, that the act of 1843 takes away the executor's general right of retainer; and it may be clearly inferred from the case, that this common law right existed here until this act. If you remove him, you destroy the protection which the law threw over his debt, and subject it to the statute of limitations; you deprive him of all

the notes and money, notwithstanding he may have paid debts to the amount of them. It sometimes happens that an executor pays debts in full, supposing the estate to be solvent, or in ignorance of debts contracted out of the State. If the act of 1843 is made to relate back, and govern the prior report, the executor is deprived of all these rights. The report of insolvency by the executors in this case, as the law then stood, did not deprive them of their office, nor did it put it in the power of any officer of the law to deprive them of it. Nor can the act of 1843 be made to retroact on the report, and give it an effect which it did not have when made. It may well be doubted whether the legislature had any such power; but it is enough for the argument that they have not attempted to exercise it: the act itself shows that it was intended to be prospective only. Phillips v. Gray, 1 Ala. 226; Martin v. Baldwin, 7 *ib.* 923; Gould v. Hayes, 19 *ib.* 429.

If this be so, then nothing less or other than a report and decree after and under the act of 1843, can deprive the executor of his office. All the court could do would be, to make distribution of the assets in his hands according to the statute in Clay's Dig. 194 § § 10, 11, 12.

D. C. Humphreys and C. C. Clay, Jr., *contra:*

The Probate Court was proceeding to do just what this court determined at January term, 1852, ought to be done.—Steele v. Weaver's Executors, 20 Ala. 540; Weaver's Executors v. Weaver's Creditors, *ib.* 557. The court below, therefore, committed no error, and plaintiffs in error should be taxed with the costs individually.

CHILTON, C. J.—This case was before us at a previous term, and the facts will substantially appear in the statement of it as reported in 20 Ala. 557. It was then held, that the order of the Probate Court, requiring the parties to proceed to a settlement with the executors under the law as it existed prior to the passage of the act of 1843, and disregarding the provisions of this act, was erroneous, and the cause for that reason was reversed and remanded.

1. In the certificate of reversal sent down by the clerk of this court, it was certified "that the records and proceedings of said

court, in a certain final settlement of the estate of George I. Weaver, deceased, wherein, by said court, at the August term, 1851, it was considered, that in the case of George Steele, creditor, and the executors of the estate of Geo. I. Weaver, a decree was rendered requiring the executors to settle up before the court would hear the contest among the several creditors upon the objections filed, which, being brought before the Supreme Court, by appeal," &c., "was reversed, annulled, &c." The counsel for the executors insisted in the court below, and here contend, that the effect of this certificate was, a direction to the Probate Court to proceed and test the validity of the claims of the creditors before making a settlement with the executors. But we do not think this construction of the certificate can be supported. The clerk merely refers to the decree or order of the Probate Court, and copies so much of it as he deems necessary to identify it and show what decree it was which this court set aside. The object of the certificate is accomplished, when the primary court is thus informed of the action which this court has taken upon its judgment or decree. The reasons for the reversal, and the course indicated as a guide for the primary tribunal, will usually be found in the opinion delivered in the cause, a copy of which the law requires the clerk to transmit under his certificate to the court below; but these constitute no portion of the judgment entry, upon which his certificate is predicated.

The ground of reversal in this case, when previously here, was not that the court required the executors to settle before the creditors' contests were tried, but that it required them to settle *at all*, in the posture of the case as then presented; for the record showed that the act of 1843 had not been complied with, by giving the proper notice.

2. We have duly considered the argument of the counsel for the plaintiffs in error, in opposition to giving to the act of 1843 a retrospective operation, so as to make it apply to estates which had been reported insolvent prior to its passage, and were the question an open one in this court, we should be strongly inclined to restrict its operation to estates reported insolvent after the statute took effect; but the contrary construction has been too firmly established, by numerous decisions of this court, now to be disturbed without great detriment to the public. Be-

sides, such construction has become a part of the law of this case by the decision pronounced in it when previously before us; and it is well settled that, when a cause is brought the second time before this court, we will not question the correctness of the law as declared by the previous decision of it.—Meredith v. Nash, 4 S. & P. 62; Gee v. Williamson, 1 Por. 321; Goodwin v. McGehee, 15 Ala. 239; Rugely & Harrison v. Robinson, 19 Ala. 412.

The retroactive effect which this court, by a series of adjudications, (see 7 Ala. 923; 9 *ib.* 925; 10 *ib.* 915; 12 *ib.* 494; 20 *ib.* 540, 557,) has given to the act of 1843, does not, in our opinion, conflict with any constitutional provision. The law, prior to the act of 1843, subjected the property of a deceased insolvent to the payment of his debts, and certain remedies were provided for the benefit of his creditors. This act, designed as an amendment to the previous laws, affects the remedy, and, without divesting the previous representative of the estate of any right partaking of the nature of a contract, it transfers the office which the previous law had conferred upon him, by the appointment of the court or the award of letters testamentary, to the person selected by the creditors, requiring him to settle with such new appointee. But it is very clear that, in this settlement, he would have a right to insist upon protecting himself, to the same extent as if he had been required to settle and make distribution under the old law, as provided for the settlement of insolvent estates: that is to say, the application of the act of 1843 to the administration, when a new representative of the estate is elected by the creditors, is tantamount to a revocation of his letters testamentary, and requires that he should come to a settlement; but, while it changes the mode of proceeding to a final settlement of the estate, it takes from the executor no vested right personal to himself and which he could have insisted upon as the law previously stood. The statute may well provide for a revocation of the authority which has been previously given him by the court under the provisions of the pre-existing law, but the legislature cannot legitimately say that what constituted a valid and binding obligation in his favor against the estate, shall be destroyed or impaired by this subsequent act.

The record before us does not show that any such right will be interfered with by the construction which has been placed

upon the act of 1843, nor that the primary court has attempted to deprive the executors of any demand which they might lawfully have claimed under a settlement made in conformity with the previous law.

The statute of 9th February, 1843, does not seem to contemplate that the contest as to the demands due to the creditors should be determined prior to their going into an election of an administrator, nor before the first representative of the estate is called to a settlement. There is certainly much reason and good sense in the suggestion that the court cannot tell, until after the contest is determined, who are and who are not subsisting creditors, since their demands or claims may be rejected, and consequently, if the election for an administrator *de bonis non* precedes the contest, persons may be allowed to vote who have no right to do so; but this is a matter to be addressed to the legislature, as a reason for a modification of the law. The act, by requiring the court to give notice that the settlement and election shall take place on a certain day, not less than thirty nor more than sixty days from the time the estate is declared insolvent, while nine months are given within which to prepare for the contest of the claims, very clearly indicates that the settlement and election shall precede the contest.—See Acts of 1843, pp. 34, 47. The sixth section also provides for the meeting of the creditors, by the assent of the court, to be continued or adjourned from time to time until an election is made, and shows that there is no such necessary connection between the settlement with the executors and the election of their successor as to require that they should be contemporaneous.

Either may precede the other, to suit the convenience of the parties, by the assent of the court, although no final judgment could be awarded against the executor until his successor was qualified. The most the court could do before that would be, to make the settlement so far as to ascertain the state of accounts between the executor and the estate, and to determine the amount of assets in his hands, and it could afterwards order the same to be delivered over to his successor, when one should be appointed as provided for.

We are unable to perceive any error in the proceedings of the court as far as it progressed. Thus far, they conform to the directions indicated by the previous decision.

Let the judgment be affirmed.

FOSTER *vs.* SYKES ET AL.

1. A stranger to a contract cannot enforce it by suit.
2. The hirer of a slave is liable to a physician for medical services rendered him, independent of any contract to that effect with the owner.

ERROR to the Circuit Court of Choctaw.

Tried before the Hon. JOHN BRAGG.

THIS proceeding was commenced before a justice of the peace to recover the amount of a physician's account for medical services rendered a slave.

The facts were these: One Mitchell hired a negro woman and her two children to the defendants, Elijah and Lewis Sykes, for the year 1847, who gave their note for the hire, with the defendant, Bush, as surety. In this note the makers agree to pay the physician's bills of the slaves for that year. The negroes went into the possession of Elijah Sykes, and during the term he placed them in charge of another person, but without any contract of hiring. This person deposes, that when he took the possession of the slaves, he told Elijah Sykes that if any of them were taken sick he would send for a physician, and that Sykes replied "well." The negroes were taken sick, and he sent for the plaintiff; who, it was proved, rendered the services for the value of which this suit is brought.

The amount claimed being under twenty dollars, the case was tried by the court without the intervention of a jury, and a judgment rendered for the defendants. A bill of exceptions to this ruling of the court was taken, and the judgment of the court below is here assigned for error.

S. E. CATTERLIN, for plaintiff in error.

C. W. RAPIER, *contra*.

LIGON, J.—From all that appears in this record, the defendant Bush is clearly not liable to the plaintiff in this action. There is no privity whatever between them. It is true, he is the surety of Elijah and Lewis Sykes on their note to Mitchell

for the hire of the slaves, in which, among other things, it is stipulated that they shall pay the physician's bill for the slaves, if it should be necessary to employ one. With this contract the plaintiff has no connection, and can take no benefit under it. It requires no citation of authorities to establish the proposition, that a stranger to a contract will not be allowed to enforce its terms by suit.

The case, however, is far different with the other defendants. They are the hirers of the slaves, and as such are liable for the physician's bill, independent of their contract with the owner. —Mecker v. Childress, Ala. R. (Minor's) 109; Hogan v. Carr *et al.*, 6 Ala. 471.

The witness who had possession of the slaves, and who testifies that he had authority to call in a physician in case of necessity, was, from all that appears, the agent of Elijah and Lewis Sykes, and not a hirer from them. He deposes that he employed the plaintiff to attend on the slaves, during the term for which they had been hired by the Messrs. Sykes, and the law implies a promise on their part to pay him a reasonable compensation for his services. Under these circumstances, and as the value of the services was fully proved in the court below, he was entitled to his judgment against them for the sum so proved.

Let the judgment be reversed, and the cause remanded.

CULLUM ET AL. *vs.* BRANCH BANK AT MOBILE.

1. When the record shows that the residence of a non-resident defendant is known, it must also show that a copy of the order of publication was sent to him by mail within forty days from the time it was made; and the omission of this will reverse the decree on error.
2. The removal of a trustee from the State, without having executed the trust confided to him, gives the Court of Chancery authority to execute it.
3. When a mortgage is assigned by the principal debtor to a trustee for the protection of his surety, with authority to collect the mortgage notes and pay the debt out of the proceeds on default being made in its payment, the creditor is entitled to the benefit of the security.

4. When a debt is secured by the assignment of a mortgage, the security is not impaired by the statute of limitations barring a recovery on the note.
5. Nor does the renewal of the note affect the security, although no express understanding is made in relation to its continuing.
6. When a creditor, whose debt is secured by the assignment of a mortgage, purchases a judgment which constitutes a prior lien on the mortgaged premises, at the request of his debtor, and with the express understanding that it shall be tacked to the mortgage and paid out of the fund, he is entitled in equity to have it tacked to his mortgage and paid out of the fund.

ERROR to the Chancery Court of Mobile.

Heard before the Hon. J. W. LESESNE.

THE bill was filed by the Branch Bank at Mobile against the plaintiffs in error, to foreclose a mortgage. The facts sufficiently appear from the opinion.

CAMPBELL & CHANDLER, for plaintiffs in error.

HOPKINS & JONES and JOHN T. TAYLOR, *contra*.

GOLDTHWAITE, J.—The record shows that the residence of one of the non-resident defendants was known, and the proof of publication as to him was deficient, as the affidavits did not show that the copy of the order of publication was sent to him by mail, within forty days from the time it was made.—Butler v. Butler, 11 Ala. 668. As the order of publication must be renewed, it is unnecessary to consider the other questions raised, as to the want of service of the amendments to the bill on the non-resident defendants, or as to whether the proof of publication was deficient on other grounds than that already noticed. For this error the case must be reversed; but it is proper, with a view to its future direction, that we should consider some of the other assignments.

Upon the merits, the case made by the bill, answers and evidence, is as follows: Charles Cullum was indebted to the complainant below by note, on which George Cullum was his accommodation endorser, and John K. Collins was indebted to Charles Cullum by certain promissory notes secured by mortgage; this mortgage Charles Cullum assigned to Gayle, cashier of the complainant, and his successors, upon condition that he should hold the same as security for George Cullum on account of his endorsement, and with authority, if the note due

by Charles Cullum was not paid, to collect the notes secured by the mortgage, and pay the same out of the proceeds; when this note became due it was renewed by a new note of Charles Cullum, endorsed by George Cullum, and the old note was given up; the new note thus taken was not paid, and at the time of filing the original bill was barred by the statute of limitations; Gayle had left the State, without executing the trust, and Collins had paid no part of the mortgage notes. It further appears that one Waring was the owner of a judgment against Charles Cullum, which was a prior lien upon the mortgaged premises, which was about to be enforced against the same; and that this judgment was purchased by the complainant to protect its interests, upon the application of Charles Cullum, who consented that the judgment should be tacked to the mortgage, and also gave his consent in writing to the issue of an execution on the same without revival by *scire facias*. The Chancellor directed an account to be taken of the amount due upon the note and the judgment, a sale of the mortgaged premises if such amount was not paid by a day named in the decree, and payment of such amount to be made out of the proceeds.

The case thus made, we think, would have sustained a decree of foreclosure, and the payment of both the note and the judgment out of the proceeds of the sale. The fact that Gayle had left the State, without executing the trust which had been confided to him, gave the Court of Chancery authority to execute it.—1 Story's Eq. § 98. As to the trust itself, although it was made for the protection of George Cullum, yet that was not the only object. It was also made for the better protection of the debt, as is evidenced most clearly by the authority given in the assignment to collect the mortgage notes, and out of the proceeds to pay the note of Charles Cullum, on his failure to pay the same; and it certainly requires no authority to show that, in such a case, the creditor is entitled to the benefit of the security. This court has sustained the principle, in cases not as strong as the one under consideration.—Toulmin v. Hamilton, 7 Ala. 367; Ohio Life Ins. Co. v. Ledyard, 8 *ib.* 866. Nor does it make the slightest difference, that the note is barred by the statute of limitations. So far as George Cullum is concerned, the creditor's right to the security does not depend upon the liability of the surety to be damnified, but upon the fact

that the assignment was made to protect the debt.—Ohio Life Ins. Co. v. Ledyard, *supra*. The security is not impaired as to Charles Cullum, for the reason that the statute of limitations, in cases of contract, affects the remedy only, without discharging the debt.—Duval's Heirs v. McLoskey, 1 Ala. 710; Jones v. Jones, 18 *ib*. 248.

It is also equally clear, that the security afforded by the assignment of the mortgage was not lost by the renewal of the note of Charles Cullum, although there may have been no express understanding in relation to the security continuing. The debt was the same, although it was evidenced by a new note; and equity, in such cases, looks to the debt, and not to the shape it may assume.—Conner v. Banks, 18 Ala. 40.

In relation to the complainant's right to have satisfaction out of the mortgaged property for the amount of the judgment, we also entertain no doubt. The owner of the judgment, Waring, had a prior lien on this property, and, as the evidence shows, was threatening to enforce it; and the evidence also shows, that it was taken by the Bank in order to protect itself, and to preserve the rights which it had acquired under the assignment of the mortgage of Collins. In addition to this, it was taken at the request of Charles Cullum, and with the express understanding that it should be tacked to the mortgage and paid out of that fund. Under these circumstances, the case is a stronger one than that to which the Chancellor refers in his decree, The Silver Lake Bank v. North, 4 Johns. Ch. 370; and it would be contrary to equity, to refuse to do that which the parties themselves agreed on, and which may have exerted some influence in inducing the complainant to become the purchaser of the judgment.

For the error above noticed, the decree of the Chancellor is reversed, at the cost of the defendants in error, and the cause remanded.

BENNING *vs.* NELSON.

1. In a claim suit under the statute, where the plaintiff in execution attacks the *bona fides* of the deed executed to the claimant by the defendant in execution, as having been made with intent to hinder and delay the grantor's creditors, evidence that the grantor executed another deed on the same day to the same grantee, who was his son and a minor, that the grantor was in embarrassed circumstances at the time, and that the two deeds conveyed all his property in this State, is relevant to the issue, and its weight must be determined by the jury.
2. The assent of a creditor to a deed of trust of which he is the beneficiary will be presumed, and the deed becomes perfect on its execution as against other judgment creditors who afterwards levy executions on the property; but if the deed is made with intent to hinder and delay creditors, an actual assent by the beneficiary before the levy of an execution is necessary, to render it valid as against the plaintiff in execution.

ERROR to the Circuit Court of Tallapoosa.

Tried before the Hon. ROBERT DOUGHERTY.

TRIAL OF THE RIGHT OF PROPERTY between Henry L. Benning, plaintiff in execution, and William N. Nelson, claimant. Two executions were issued on a judgment in favor of said Benning against Thomas M. Nelson, and were levied on the property now in controversy as the property of the defendant. A claim was interposed in each case by said William N. Nelson, and bond given according to the statute. The first execution was levied on three negroes, to-wit: Jim Hardy, Kesiah and Jerry; and the second was levied on "forty head of cattle, eight mules, two wagons, fifty barrels of corn, four thousand pounds of fodder, six sows and pigs, and two yoke of oxen." The two claims suits were tried together, and the issue was, whether the property embraced by each levy was subject to the execution levied on it.

On the trial, the plaintiff read in evidence the two executions aforesaid, with the returns thereon endorsed showing the levies, the interposition of the claim, and that the defendant had no other property in the county subject to the executions; and then proved that said defendant in execution bought a plantation in Tallapoosa in 1836 or 1837, and resided thereon until about

1844, when he removed with his family to Columbus, Georgia; that after his removal he continued to cultivate said plantation, with the same slaves which he had owned and used in cultivating it for five or six years previous to 1844, and has employed overseers on said plantation every year until 1850, and has come up from Columbus every summer and spent his summers on said plantation; that the slaves levied on were among the slaves so owned, possessed and used by said defendant; that they, and the other personal property levied on, were on said plantation when they were respectively levied on, and in the possession of the overseer, who was employed by said defendant, and was in his service. He also proved the separate value of each article levied on, and rested his case.

The claimant then proved that said defendant, in the State of Georgia, on the 20th December, 1838, married Anna M. Carnes, and on the day before his marriage entered into an antenuptial contract with her, which, after proving its execution, claimant read in evidence to the jury. This deed recites the intended marriage, and that said Anna M. Carnes was possessed of property amounting to $20,000, consisting of lands, negroes, Bank stock, debts, household furniture, &c., which property the said Thomas M. Nelson was to receive "as and for the said Anna's marriage portion;" in consideration of which, the said Nelson covenants "to settle and charge his estate with the sum of $20,000, for the benefit of the said Anna and her heirs, in lieu of dower and of the property received through her, for her own proper use and benefit, free from any liabilities of the said Thomas M. Nelson." The claimant also proved that, at the time of the execution of said contract, said Anna owned property to the amount of $20,000, which passed into the possession of said Nelson on their marriage.

The claimant then read in evidence, after proving its execution, a deed of trust executed by said defendant in execution to claimant, on the 22nd September, 1846, conveying to him about thirty negroes, including the three now levied on, "together with the mules, plantation utensils, stock of all kinds and crop of provisions on the plantation of said Nelson in Tallapoosa," "in trust for the part payment of the above mentioned marriage settlement." The claimant then introduced a witness, "who testified that he was the overseer on said plantation during the

year 1849, and was such at the time each of said levies was made; that he knows the three negroes levied on, and that they are a part of the negroes mentioned in the foregoing deed of trust; that he also knows the property mentioned in the second levy; that the corn and fodder therein mentioned was made on said plantation, by the slaves mentioned in said deed of trust, during the year 1849; that the cattle, mules, wagons, oxen, sows and pigs, mentioned in said levy, are all the property of that kind or description which was used in making that crop, or was on the plantation for consumption, and used that year; that the mules, cattle and oxen were on the plantation in the year 1847. The claimant then rested his case."

The plaintiff then read in evidence, after proving its execution, a deed of trust executed by the said defendant in execution to the claimant, dated said 22nd day of September, 1846, conveying said plantation in Tallapoosa and some twenty eight negroes, in trust for the payment of certain specified creditors of the grantor. "It was also proved that both of said deeds of trust were executed on the same day, at the same time, by the same grantor to the same grantee, and that they embraced all the property then owned by said defendant in execution in the State of Alabama; that the claimant was about twenty years of age, was the son of said defendant in execution, and resided in Columbus, Georgia; that, at the execution of said deeds of trust, said defendant in execution was indebted to plaintiff about $1500, and to one Lockwood about $1660, besides some other small debts in Alabama; and that the debt on which plaintiff's judgment and execution aforesaid were founded was of older date than either of said deeds of trust."

The plaintiff offered to prove "that some of the slaves conveyed by said last mentioned deed of trust were worked and used in making the crop on said plantation in 1848 and 1849. The claimant objected to this evidence, and the court refused to admit it; to which plaintiff excepted."

"The foregoing was, in substance, all the evidence offered or adduced on the trial of this cause; and the court thereupon charged the jury, that if the said defendant in execution and his wife, before their marriage, executed the ante-nuptial contract aforesaid, and that they were afterwards married, and that her husband received $20,000 worth of property with her, then the

said contract constituted her a creditor of said defendant in execution; and if, after their marriage, on the 22d September, 1846, in consideration of said ante-nuptial contract, said defendant executed the deed of trust of that date read in evidence by the claimant, although the jury might believe that the deed of the same date read in evidence by the plaintiff in execution was fraudulent, this would not affect the deed to the claimant, and that they ought to find for the claimant. The plaintiff in execution excepted to this charge.

"The plaintiff in execution asked the court to charge the jury as follows, to-wit: if the jury believe the foregoing evidence, and if they believe from the evidence that the deed executed by said defendant in execution to the claimant on the 22nd September, 1846, and read in evidence by the claimant, was executed with the intent to delay, hinder and defraud the creditors of said defendant, and if they further believe that such intent was known to and concurred in by the claimant at the time of the execution of said deed, and if they further believe that the said Anna M., the wife of said defendant, had not assented in fact to its provisions, nor claimed any benefit under it, before the said first levy was made, then the jury ought not to find for the claimant. The court refused to give this charge, and the plaintiff excepted."

The plaintiff now assigns for error, that "the court below erred as shown in the bill of exceptions."

Rice & Morgan & Belser, for plaintiff in error.

Geo. D. Hooper and L. E. Parsons, *contra*.

PHELAN, J.—The question of fraud calls for and justifies great latitude in the admission of evidence. The proof made by Benning, when attacking the *bona fides* of the deed in trust made in favor of Mrs. Nelson, that two deeds were made at the same time, by the same grantor, to the same trustee, that the grantor was the father of the trustee who was a minor at the time, and that the two deeds embraced all the property of the grantor in this State at the time, and that he was then embarrassed with debt, was properly admitted as relevant to the issue touching the *bona fides* of the trust deed upon which the claimant relied. These things of themselves might be easi-

ly rebutted, and might deserve but little weight as tending to prove fraud in the deed in favor of Mrs. Nelson, the consideration for which was fully shown. Still the evidence was relevant, and its weight was for the jury to decide. We cannot, therefore, say that there was no evidence in the case, tending to show that the trust deed in favor of Mrs. Nelson was made "to hinder, delay and defraud creditors."

The determination of this point settles the main question in the case, that raised by the refusal of the court to instruct the jury as requested by the counsel for Benning, the plaintiff in execution.

No doubt the principle contended for by the counsel for the claimant, is true: that the deed in trust in favor of Mrs. Nelson, wife of the defendant in execution, being evidently for the benefit of that lady, her assent to its provisions is and ought to be presumed. Numerous cases in our court and elsewhere go to establish this doctrine.—Lockwood v. Nelson, 16 Ala. 294; Kinnard v. Thompson, 12 Ala. 487; 11 Wheaton 73; 16 Peters 139.

But that principle will not avail in such a case as the one presented by the charge requested by the counsel for plaintiff in execution and refused. That case is this: If you (the jury) believe from the evidence that this deed in trust, made in favor of Mrs. Nelson, was made "to hinder, delay and defraud creditors;" that both the grantor and trustee concurred in that design, and that no actual assent was made to it, or benefit claimed or taken under it, by the *cestui que trust*, Mrs. Nelson, until after the lien of the plaintiff's execution had attached upon the property, then you must find for plaintiff in execution.

The principle of law here involved was fully considered and settled in the case of Townsend v. Harwell, 18 Ala. 301. None of the precedents met the case, but the argument of the present Chief Justice we consider sound, and that case will be followed in this instance. The argument in brief may be stated thus: The statute declares positively, that a deed "made to hinder, delay and defraud creditors," shall be void, except as against *bona fide* purchasers for a valuable consideration. To this it is replied, that the beneficiary of a trust deed plainly beneficial to him, where he is a creditor of the grantor, is a *bona fide* purchaser for a valuable consideration, and as the law presumes the

assent of such an one, the deed becomes perfect in law on its execution, and no other creditor can attach or levy successfully after that time. The answer is: No; the law will presume such an assent, all things being fair and *bona fide* on the part of the grantor; and to show that the *cestui que trust* is an honest creditor to the full amount of the debt secured by the deed, and the security not more than reasonable, is to repel, by the strongest and most convincing proof, the imputation of any design on the part of the grantor "to hinder, delay and defraud creditors," at the time he made the deed. Still, if there is any proof tending to show fraud on the part of the grantor, it is for the jury alone to settle the question of fact, and determine the motive by which he was actuated. Ordinarily, where the facts of a case leave room to refer an action equally either to a good motive or a bad one, the jury are bound, by a due regard to their common human nature and the rule of law, to give the good the preference. But, if, even in the face of the proof that a man had devoted his property to the payment of a just debt, the jury should still find reason to believe that a deed was made to "hinder, delay and defraud," they have the power to do so.

It comes then to this: If a jury should find the fact to be, that a deed was made by the grantor with intent "to hinder, delay and defraud creditors, the law will not presume the assent of a beneficiary to such a deed, however much it might really be for his benefit, because this would be to put it in the power of the grantor, by the aid of a legal presumption, to make valid his own fraudulent deed. Such a deed can only become valid by the actual assent of the beneficiary in some form. Until such actual assent, any creditor may levy or attach, and hold in defiance of the deed. The charge which was asked only embodies this principle, and should have been given.

The charge which was given, as we construe it, only asserts the proposition, that, if the deed of trust in favor of Mrs. Nelson was *bona fide*, and upon good consideration, it could not be affected by fraud in the other deed, if the jury should even believe the other deed to be fraudulent. There was no error in this. The wording of the charge may leave room to object that the court was assuming the facts, but it will not fairly bear that construction.

The evidence offered by the plaintiff and rejected, we conceive to have been irrelevant. That some of the negroes embraced in the deed in trust offered by the plaintiff, "were worked and used in making the crop in 1848 and 1849," of itself, proves nothing. *Non constat* but they had been hired or purchased of the beneficiaries in that deed. If the possession of them had not been changed, since the making of the deed, there was a plainer way to come at that.

For the error in refusing to charge as requested, the judgment is reversed, and the cause remanded.

GOVERNOR, USE, &c., *vs.* PERRINE ET AL.

1. When a sheriff has taken property under attachment, which he afterwards sells, by agreement between the plaintiff and defendant in attachment, without an order of court, his sureties are not liable on their bond for his failure to pay over the money.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS was a summary proceeding under the statute, in the name of the Governor, for the use of Chamberlain & Co., against the sureties of George Huggins, late sheriff of Mobile, on the following facts, constituting an agreed case:

"Whereas, under and by virtue of an attachment in favor of Chamberlain & Co. v. James J. Dyer, the sheriff, Huggins, who departed this life before the commencement of this action, seized and took into his possession on the 20th day of October, 1848, the day on which he received the attachment, goods and effects of said Dyer more than sufficient to satisfy the debt and costs; that on the same day an agreement was made in writing between the attaching plaintiffs and the agent of the defendant, Dyer, by which the sheriff, Huggins, was authorized to sell and dispose of the said goods and effects, waiving any order of court or advertisement, and they were accordingly sold by the said Huggins at public sale on the 27th of October, 1848, for more

than enough to satisfy this debt and costs, for which plaintiffs afterwards obtained judgment; and said Huggins delivered the goods to the purchasers, and received the money therefor, which he never paid over, either to the clerk of the court or to the plaintiffs, though often requested so to do, in his life-time. Now, if by reason of the parties having entered into the said consent, to sell said goods and effects without the order of court or an advertisement, the sureties are not liable, judgment is to be rendered for the defendants; otherwise, for the plaintiffs."

On these facts the court below gave judgment for the defendants, and the plaintiffs appealed; and they now assign for error the judgment of the court.

C. W. Rapier, for appellants.

John T. Taylor, *contra.*

GIBBONS, J.—We concur in the conclusions of the court below upon the statement of facts presented in the agreed case. The sale of the goods having taken place without any order of court, or authority to the sheriff to make the sale, but being made by the consent of the parties in the attachment suit, it could not be said to be an official act of the sheriff, but rather that of a private individual as the agent of the parties to the suit. The securities of the sheriff are only liable for his defaults while acting in his official capacity; and that has been defined to be, action in obedience to legal process in his hands. Dean *et al.* v. Governor, 13 Ala. 526, and authorities there cited. If the sheriff, in the present case, had destroyed or converted the goods levied upon and seized under the attachment, the sureties would undoubtedly have been barred; but when by the act of the parties to the suit merely the goods are sold, without any order of court or legal authority to sell, so that the sale does not become official in its character, the sheriff becomes the mere bailee of the money, and does not hold it as he does money collected under judicial process. The scope of the contract of the sureties of a sheriff is, that they will become liable for his defaults in regard to moneys which he receives in his official character as sheriff, acting strictly in accordance with, and in obedience to the law. The contract does not extend to moneys which he holds as a bailee, or mere stake-holder. We do not regard the present case as differing in principle from what it

would have been if the parties to the attachment had by consent themselves sold the property levied on, and deposited the money with the sheriff to abide the event of the suit. In that case, he would be a mere stake-holder, and his defaults in respect to it could involve no one but himself in the liability incurred.

Let the judgment of the court below be affirmed.

HUTCHISSON ET AL. *vs.* GOVERNOR, USE &c.

1. In an action against a sheriff and his sureties, for an alleged escape of a debtor in custody under bail process, an allegation in the declaration that the *capias* was "marked and endorsed for bail," is sufficient to show that he was required by the process placed in his hands to hold the defendant to bail.
2. A debtor in custody under bail process, who wishes to discharge himself by rendering a schedule of his property under the statute, (Clay's Digest 70 § 3,) may make his application for a discharge to any justice of the peace, and the latter is authorized to act upon it alone. (Overruling Morrow & Nelson v. Weaver & Frow, 8 Ala. 295, which held that the application must be made to two justices of the peace or a judge.)

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

C. W. RAPIER, for appellants :

1. The court erred in overruling the demurrer to the declaration. The averment that the *capias* was "marked and endorsed for bail," was not sufficient.—1 Saunders' Pl. & Ev. 188, 479; 2 Chitty's Pleading 739, 446, and notes; Nightingale v. Wilcoxon, 15 E. C. L. R. 57; Sharpe v. Abbey, *ib.* 413.

2. The demurrer to the second plea should have been overruled. The plea shows that the debtor was legally discharged. —Clay's Digest 70 § 3. The act of 1839 authorizes one justice to hear such an application. The case of Morrow & Nelson v. Weaver & Frow, 8 Ala. 295, is not conclusive of this case.—That was a suit on a prison-bounds bond, and the question in this case was not there directly presented. But, even if the

proceedings were irregular, they were sufficient to justify the sheriff.—3 Porter 257; 5 Wend. 170; 1 Denio 146; 5 Barbour's S. C. R. 273.

Wm. Boyles, *contra*, contended:

1. That the demurrer to the declaration was properly overruled.—2 Chitty's Pleading 419, 420, 739; 1 Saunders' Pl. & Ev. 188, 189.

2. That the demurrer to the plea was properly sustained.—One magistrate had no jurisdiction in such a case. The acts of 1807, 1811, 1821, 1833 and 1839, form parts of a system, and are to be construed in *pari materia*.—Wade v. Judge, 5 Ala. 130; Morrow & Nelson v. Weaver & Frow, 8 Ala. 295. To justify a sheriff for discharging a prisoner under an order of a judge, the subject matter of the order must appear to be within the jurisdiction of the judge, and it must be the precise order which the statute authorized him to make.—5 Barbour's S. C. R. 273, and cases there cited; *ib.* 37; 15 Johns. 152; 3 Cranch 231.

CHILTON, C. J.—This was an action of debt by the defendant in error against Hutchisson and his sureties, as sheriff of Mobile County, brought upon his official bond, for an alleged escape permitted by the sheriff (Hutchisson) of one Henry Fleshman, then in his custody by virtue of bail process in favor of Chesborough & Bowers.

There was a demurrer to the declaration, upon the ground that it did not sufficiently allege that the sheriff was required by the process placed in his hands to hold the party defendant to bail. The allegation is, that the *capias* "was marked and endorsed for bail." The demurrer was overruled, and we think very properly. Although this averment is not very formal, yet, in substance, it conforms to the precedents, being sufficient to show that the sheriff was directed to require bail of the defendant.

2. The defendants in the court below, among other things, pleaded that the said Henry Fleshman, after the arrest and while in custody of the sheriff, appeared before William Brooks, then an acting justice of the peace for Mobile County, and took the oath prescribed (by § 3 Clay's Digest p. 71) to be taken by

insolvent debtors under arrest, and who sought to be discharged by rendering a schedule of their property, which oath was contested by the plaintiffs in the process; that the issue thus tendered was tried before said justice, and found by a jury in favor of Fleshman, the prisoner, who was thereupon ordered to be discharged from the custody of the sheriff, and was so discharged by virtue of and in obedience to said order. All the proceedings, with a copy of the schedule, are set out *in extenso* in the plea. The court sustained a demurrer to this plea, and the question is presented whether it presents a good defence to the action.

According to the act of 1839, if the party arrested fail to controvert on oath the ground upon which process for his arrest was obtained, "then such debtor may discharge himself from said arrest, by rendering a schedule of all the estate, effects, choses in action and moneys which he has in possession, or is entitled to, and taking the subjoined oath before any one authorized to administer the same," &c. (Here follows the precise oath taken by the defendant, Fleshman, as set out in this record.) And if the plaintiff shall desire to controvert the truth of such oath or schedule, then, on making oath that he believes the same to be untrue, any justice of the peace shall be authorized to summon a jury of twelve men, *instanter*, to try the question whether said oath or schedule is untrue and fraudulent or not; and said jurors shall be liable to the challenge of either party, as in civil cases."

The next section provides: "In the event a debtor shall be convicted, by the verdict of a jury, of rendering a false or fraudulent schedule of his estate, he shall be sentenced to imprisonment for a period not exceeding one year; *provided*, that either the creditor or debtor may appeal to the circuit or county court," &c.

The object and design of this act was to prevent honest debtors, who possessed nothing subject to the payment of their debts, or who were willing to make a surrender of what they had, as well as those who had been arrested upon false allegations of fraud &c., from being detained in confinement, and it provides a speedy mode for their release.

If the debtor shall make the oath prescribed in the second section, (Clay's Digest p. 70,) before any person authorized to

administer the same, "then he shall," in the language of the act, "be released by the arresting officer immediately." It does not require a formal discharge to be obtained from a judge or court. The debtor is not to be detained in custody until all his creditors can be notified, but the oath required by this section, subscribed and sworn to before some officer legally qualified to administer such oath, is all that is required. He is to be thereupon discharged *immediately*, and this oath is the arresting officer's authority for such discharge.

If, however, he does not take the oath, that the particular ground upon which he is arrested is untrue, &c., he may discharge *himself from arrest* by rendering a schedule, &c.; and if the plaintiff does not desire to controvert this schedule, and the oath attached to it, this operates his discharge. If, however, he does controvert, and makes the required oath, a jury is to come *instanter* to try the issue before a justice of the peace, who proceeds to try the issue and to give judgment according as the jury may find the one way or the other. If the issue be found against the debtor, a heavy penalty is to be inflicted; but if his schedule be found true and honest, we are not permitted to entertain a doubt as to the duty of the justice to declare that the debtor be discharged from the arrest. The question as to how the effects embraced in his schedule shall be disposed of, is not before us. Neither are we called on to decide whether it is the duty of the debtor or officer holding him in custody to give any, and what, notice of the proceeding for the discharge by rendering a schedule; for in the case before us, the creditor appeared and contested, thus dispensing with notice, if any was necessary. What is said in the case of Morrow & Nelson v. Weaver & Frow, in 8 Ala. 295, if intended to apply to a case like the one before us, requiring the application to be made before a judge or two justices of the peace for a discharge, who are to hear and determine upon it, and holding that one justice may nevertheless try the truth and fairness of the schedule, is opposed to the statute, as we conceive, and cannot be supported as the law. The plea was good, and should have been sustained.

Let the judgment be reversed, and the cause remanded.

McWILLIAMS ET AL. *vs.* RAMSAY, ADM'R.

1. A husband conveyed by deed certain negroes to a trustee, in trust 'for the use, behoof and benefit of the grantor's wife *forever; provided*, however, that the title or property in said slaves should be and remain in the trustee for the use and behoof of the wife, her heirs, executors and assigns, *during her natural life only*, with remainder to the heirs of her body by the grantor who might be living at her death; and, in default of such issue living at that time, the title and property in said slaves to revert to the grantor if living, but if dead to descend to his heirs at law:' *Held*,
   I. That the deed, as against the husband, created *a separate estate* in the wife in the property conveyed;
   II. That the proviso was not repugnant to the preceding clause, but its effect was to limit the wife's interest to a *life estate;*
   III. That the *quasi* contingent remainder to the heirs of the body of the wife by the grantor who might be living at her death, was not too remote;
   IV. That a *quasi* reversionary interest remained in the grantor; and on his death, his wife surviving, this reversionary interest passed to his administrator, and was assets in his hands.
2. When a husband conveys personal property to a trustee for the use and benefit of his wife, she takes a separate estate in the property as against him.
3. The strictness of the ancient rule as to repugnancy in deeds is now much relaxed; the intention is to be gathered from the whole instrument, rather than from particular clauses seemingly repugnant.
4. A *quasi* reversionary interest in personal property may be created by deed, as upon a gift for life with contingent remainder.
5. When an administrator returns slaves in his inventory as belonging to the estate, and hires them out, taking notes payable to himself as administrator, he is not thereby estopped from amending his inventory, so as to leave them out if they do not belong to the estate.

ERROR to the Court of Probate of Autauga.

THE legal questions involved in this case arose upon an issue contesting the report of insolvency made by the defendant in error as administrator of Bartley L. Cox. On the trial, the said administrator introduced the following deed, after having proved its execution:

"THE STATE OF ALABAMA, } This indenture, made and
Autauga County. } entered into on this the first day of February, 1849, between Bartley L. Cox of the first part, and James Ramsay of the second part, witnesseth: That

the said Bartley L. Cox, for and in consideration of the natural love and affection which he bears towards Penelope E., his wife, and the sum of one dollar to him in hand paid by said Ramsay, has given, granted, bargained, sold and conveyed, and by these presents doth give, grant, bargain, sell and convey the following negro slaves, to-wit: Anthony," &c., "and their increase, to have and hold said slaves to the said James Ramsay, for the use, benefit and behoof of the said Penelope E., wife of the said party of the first part, forever; *Provided*, however, that the title or property in said slaves shall be and remain in the said Ramsay, for the use and behoof of the said Penelope E., her heirs, executors and assigns as aforesaid, during her natural life only; at the termination of which natural life of the said Penelope E., the title or property in said negroes and their increase to descend to and vest in the issue or bodily heirs of the said Penelope E., should she have borne any such by the said party of the first part, should any of which said heirs be living at the termination of the natural life of the said Penelope E.; but should the said Penelope E have borne no bodily heir or heirs by the said party of the first part, which said heir or heirs shall be living and survive the said Penelope E., then, and in that event, the title and property in said slaves to revert and remain in said party of the first part, and should said party of the first part depart this life before, and leave the said Penelope E. living, then the title and property in said slaves and their increase shall descend to the heirs at law of him, the said party of the first part. And it is further expressly understood, by and between the parties to these presents, that said slaves and their increase shall be and remain in the possession of the said James Ramsay, for the use, benefit and behoof of the said Penelope E., her heirs and assigns forever, and that all and singular the benefits, proceeds, &c., arising from the labor, increase, &c. of said slaves, to go to the said Penelope E. during her natural life; should said life terminate before that of said party of the first part, then said slaves to descend and be divided among the bodily heir or heirs by the said party of the first part of the said Penelope E., if any, and should there be no such bodily heir or heirs, then to the heirs at law of the said party of the first part as aforesaid. And it is further understood by said parties, that should it at any time hereafter be

necessary to dispose of said negroes, or either of them, or their increase, by sale or otherwise, with the consent of the said Penelope E., the said party of the second part is hereby empowered to do the same, provided it can be done for the benefit or interest of the said Penelope E., and before the death of said party of the first part. In testimony whereof we have hereunto set our hands, and affixed our seals, the day and date aforesaid.

BARTLEY L. COX, [*Seal.*]
JAMES RAMSAY, [*Seal.*]"

This deed was recorded, but not in the mode required by the law. It was admitted that Bartley L. Cox was married to the said Penelope E. at the execution of the deed; that they lived together as man and wife up to the time of his death, which was in February, 1851; that he died leaving no child or children by the said Penelope E., who survived him, and was then living; that the slaves specified in the deed remained in his possession up to the time of his death; that after the death of said Cox said Ramsay took out letters of administration on his estate, returned the slaves in his inventory as belonging to the estate, hired out the same, and took notes for their hire payable to himself as such administrator; but that he subsequently applied for leave to amend his inventory so as to leave out said slaves, and leave was given that he might so amend. It was also admitted that he applied a portion of the hire of said slaves to the payment of the debts due by said Bartley L. Cox; that there had been no reconveyance of said slaves by Ramsay to Bartley L. Cox, and that if the slaves specified in the deed are not assets of the estate, the same is insolvent, but if assets, the same is solvent as to all debts which had been presented.

Upon this state of facts the court charged:

1. That said slaves were not assets of the estate of Bartley L. Cox;

2. That upon the whole evidence the jury should find that the estate was insolvent.

There were other charges given, and also sundry charges requested by the plaintiffs in error, which it is unnecessary particularly to notice, as the legal questions presented are considered by the court upon the second charge above stated.

The charges given are here assigned for error.

WATTS, JUDGE & JACKSON, for plaintiffs in error.

N. HARRIS, *contra.*

GOLDTHWAITE, J.—The principal question in this case is, as to the construction of the deed executed by Bartley L. Cox on the 1st February, 1849; and we are clear that under it, Mrs. Cox took an equitable estate in the slaves conveyed, as her separate estate, the legal interest being in the trustee, Ramsay. The rule is settled in the English courts, that a gift of personal chattels by the husband to the wife will be supported in equity, to the exclusion of the husband, (Lucas v. Lucas, 1 Atk. 270;) as where the husband transfers stock held by him, into the name of of his wife, or of himself and wife.—(Rider v. Kidder, 10 Ves. 760; George v. The Bank of England, 10 Price 646; and see also Williams v. Maull, 20 Ala. 721, 730.) Upon what principle are gifts of this character supported, unless it be upon the presumption that, when a husband gives property to his wife, he intends it to be for her separate use?—Here, the slaves are given for the use, benefit and behoof of the wife, and the trustee is authorized to dispose of them with her consent. How can the slaves be given for the use and benefit of the wife, unless it is intended by the husband that the wife should have the benefit of them? If the donor was not the husband, the case would be different; but standing in that position, the language of the deed admits of but one construction. If the gift had been directly to the wife, as we have adready seen, equity would sustain it against the husband, as divesting him of his marital rights, and here, as a trustee is interposed, we must hold that he takes the legal title, and that he holds as such for the separate use of the wife.

2. It is insisted by the defendant in error that, as the deed conveys the slaves to the use of the wife "forever," the subsequent clause which limits her interest to a life estate only, must be rejected as being repugnant to the preceding clause, and in this aspect she is entitled to the entire beneficial interest; but we do not think this position can be sustained. The strictness of the old rule in relation to repugnancy, has been essentially modified by the later decisions. The object of the rule itself could only have been to ascertain the intention of the parties, and the flagrant injustice which must too frequently result from

its rigid observance, has led judges to seek that intention from the whole deed, rather than from particular parts. The rule, it is true, must still apply, where two clauses of a deed are utterly repugnant, and it is impossible from the other portions of the instrument to discover, with any thing like certainty, the intention of the parties; but where that is clear from the whole deed, the doctrine of repugnancy has no application.—4 Green. Cruise, Title 32, ch. 12, § 26, n. 1. In relation to the deed under consideration, there can be no doubt as to the intent of the donor to confer but a life interest upon the wife. The words are "to hold said slaves &c. for the use" &c. "of the said Penelope E. forever; *Provided*, however, that the title or property in said slaves shall be and remain in the said Ramsay, for the use &c. of the said Penelope E. during her natural life only." The natural and legitimate office of a proviso is, to restrain or qualify some matter which precedes it; and the words of limitation upon the interest of the wife, as they are found in the proviso, sufficiently indicate the intention of the donor to confine the gift to the wife to the term of her natural life. But, in addition to the language of the proviso, we have the limitations over upon the termination of the life interest: the donor not only, in express terms, limits the beneficial interest of the wife to her life, but he also makes a disposition of the property after the termination of that interest. We must, if possible, so construe the deed as to give effect to these limitations, and we cannot sustain them, unless we support the proviso. We all agree that under the deed the wife took but a life interest.

The only remaining question upon the deed, which it is necessary to determine, is, whether Bartley L. Cox, the donor, retained any interest in the slaves. That a remainder may be limited after a life estate in personal chattels by deed is well settled by the American decisions, (Horne v. Gartman, 1 Branch 63; Duke v. Dyches, 2 Strobh. Eq. 353; Roberson v. Schley, 6 Geo. 515; Greer v. Boone, 5 B. Mon. 554;) and that a contingent remainder may be so limited by deed, has been decided by this court in Price v. Price, 5 Ala. 578, and Williamson v. Mason, at the present term. The necessary consequence of this doctrine, in its application to personal property of this description, is, that if a partial disposition is made, as a gift for life, with a limitation over upon an uncertain event, the donor, upon

the determination of the particular estate, is entitled to the property, if the contingency has become impossible. In other words, a *quasi* reversionary interest in personal property results from the rule, which allows the interest which the owner has in that species of property to be divided into distinct parts, and limited *in futuro.*

In the present case, the legal title in the slaves is transferred to Ramsay, to hold for the life of Mrs. Cox, remainder over to the heirs of her body by the grantor living at her death; and the deed also, by a subsequent clause, declares, in effect, that in case of the death of Mrs. Cox, leaving no such heirs surviving her, "the title and property in said slaves" shall revert to the grantor if living, and if dead "shall descend to his heirs."—The limitation over to the heirs of Mrs. Cox is not too remote, as it is restricted to the particular heirs who may be living at the time of her death, (Kealing v. Reynolds, 1 Bay 80; Fosdick v. Cornell, 1 Johns. 440;) and as the event upon which the slaves are limited is uncertain in its nature, it is simply a contingent disposition of personal property.

The subsequent clause of the deed, which declares, in effect, that in case of the death of Mrs. Cox, leaving no heirs of her body by the grantor surviving her, "the title and property in said slaves" shall revert to the grantor if living, and if dead "shall descend to his heirs," was, as we think, inserted with the view of accomplishing that which the law, under the rules we have laid down, would have done had it been omitted. The object of the donor was simply to secure to himself the slaves and their increase, at the termination of the life interest, if the contingency upon which he was to be divested of his entire interest in the property had not then occurred, or, in case he was not then living, that the slaves should pass as other property of the like nature would have passed by his death. We base our construction on the use of the word "descend," which, although in strictness it has no application to personal property, may be regarded as expressive of the intention of the donor, that those who were entitled to the property were to take by the act of the law, rather than by the act of the party—by limitation, rather than by purchase. It is, in fact, precisely the same, as if the deed had provided that, upon the failure of the contingency, the property should revert to the grantor and his heirs.

It results from the view we have taken, that the reversionary right of property expectant upon the determination of the life interest in the slaves, passed to the administrator of the grantor; that this right was assets in his hands, and should have been returned in his inventory; and that the second charge given by the court was erroneous.

As the case must be remanded, it may be proper to add, that returning the slaves in the inventory and taking notes for their hire payable to the administrator as such, did not estop him from amending the inventory in conformity with the real facts.

The judgment is reversed, and the cause remanded.

McELHANEY *vs.* FLYNN.

1. An execution in the name of "Henry W. Collier, use of officers of court," is not void, but furnishes a protection to the officer levying it, if issued by a court of competent jurisdiction; the words "use of officers of court" may be rejected as surplusage.

ERROR to the City Court of Mobile.

Tried before the Hon. ALEX. McKINSTRY.

C. W. RAPIER, for plaintiff in error:

The execution was not, on its face, a nullity. Collier is the nominal plaintiff, nor can it be intended that he was other than an inofficial person.—Chapman v. Spence, 22 Ala. 588. The execution being issued by a competent officer, and purporting on its face to be legal, the constable might justify under it.—3 Por. 257; 5 Wend. 170.

GEO. N. STEWART, *contra:*

The execution was void for want of legal parties. The persons for whose use a suit is brought, are the true parties in interest, and are made liable for costs by law. The "officers of court" are not a corporation; no judgment can be rendered for them or against them. No motion to quash the execution could

have been made, none was necessary; there was no party to serve the notice on.—11 Ala. 741; 7 *ib.* 156.

CHILTON, C. J.—This was a proceeding commenced by warrant before a justice of the peace by Flynn against McElhaney, for seizing and detaining a gun. The justice rendered judgment for the plaintiff for twenty dollars, from which defendant appealed to the City Court of Mobile, and the plaintiff there filed his statement, claiming twenty dollars as damages on account of the alleged trespass. The parties mutually agreed to submit the case to a jury; and the court said to the jury, if the case was thus submitted to them, they would not be limited in their finding to twenty dollars, but might find the actual damage the plaintiff had sustained. The case was accordingly submitted, and the jury found thirty-five dollars for the plaintiff.

The defendant below justified seizing the gun under an execution issued by one Fisher, a justice of the peace for Mobile County, in favor of "Henry W. Collier, use of the officers of court" against Flynn, for the sum of $11 10, which was duly placed in his, the said McElhaney's, hands, to be levied and collected, he being a constable in said county. The City Court held, that the execution, being for the use of the officers of court, was void, and furnished no protection to the officer.

We are of opinion that the court mistook the law in holding that the execution was void. There were parties to it; Collier was the plaintiff, and Flynn the defendant, and although it recites that it was for the use of "officers of court," yet these words may be rejected as suplusage, and the execution, which is amendable, might well stand. We cannot then pronounce that it is void upon its face, and although it may be irregular, yet, being issued by a court of competent jurisdiction, it furnishes a protection to the officer executing it.

As this view will probably be decisive of the case, it is deemed needless to decide the remaining question raised by the instruction to the jury.

Let the judgment be reversed, and the cause remanded.

CARR'S EXECUTOR *vs.* WYLEY.

1. A guaranty of a third person, given by plaintiff at request of defendant, is not a moral but a valuable consideration, especially when connected with an express promise of indemnity.
2. The condition of a bond was as follows: "Whereas the said C. (obligee) guarantied for one J. W. W. on his bid for carrying the mail on route 3315, from Gainsville to Spring Place, in, through and by said W's (obligor's) influence and persuasion, which contract the said J. W. W. has refused to execute: Now, if said W. does and will stand between said C. and the General Post Office Department, so that said C. has no more trouble and expense, and releases said C. from all responsibility in said matter, then the above bond to be void": *Held*, that the bond was not void for uncertainty, the condition being that the obligor would indemnify the obligee against his guaranty of the mail contractor which had been given at the obligor's request.
3. An action of debt lies on a bond conditioned that the obligor shall indemnify the obligee against his guaranty of a third person which had been given at the obligor's request.
4. A foreign executor may sue in the courts of this State; and if he makes profert of his letters, the effect is the same as if they were set out in the declaration, although he does not aver in what State they were granted.

ERROR to the Circuit Court of Talladega.

Tried before the Hon. ROBERT DOUGHERTY.

DEBT by Ezekiel McCravey, as executor of Kinchen Carr, deceased, against Walton Wyley, upon a bond payable to said Carr. The declaration concludes with a *profert* of plaintiff's letters testamentary. The defendant craved oyer of the bond and condition, and of said letters testamentary, and demurred, "in short by consent, to the precedent matter and declaration." The condition of the bond, as set out on oyer, was as follows: "The condition of the above bond or obligation is such, that whereas the said Carr guarantied for said John W. Walker on his bid for carrying the mail on route 3315, from Gainsville to Spring Place, in, through and by said Wyley's influence and persuasion, which said contract the said John W. Walker has refused to execute; Now, if the said Wyley does and will stand betwixt the said Carr and the General Post Office Department, so that the said Carr has no more trouble and expense, and re-

leases the said Carr from all responsibility and damage in said matter, then the above bond to be void," &c. The letters testamentary which were set out, were granted in Georgia.

The court sustained the demurrer, and plaintiff took a nonsuit. The ruling of the court upon the demurrer is now assigned for error.

White & Parsons, for plaintiff in error:

1. We insist that debt is a proper remedy "on bonds conditioned for the payment of money, or the performance of any other act, by or against the parties and their personal representatives."—1 Chitty's Pl. 109; Herndon v. Forney, 4 Ala. 243.

2. Where plaintiff 's act is procured by the defendant's request, a subsequent promise is not a naked one.—Chitty's Con. 62; 1 Smith's Leading Cases 167, and cases cited; Com. Dig. Ac. Con. B. 1312; 1 Saunders 264 note 1; Lord Suffield v. Bruce, 2 Stark. R. 175; 1 Roll's Ab. 27, 49; Child v. Mosely, 8 Term R. 610; Stokes v. Lewis, 1 Term R. 20; Hayes v. Warner, 2 Str. 933; Dumford v. Mester, 5 M. & S. 446; Livingston v. Roper, 1 Caines 584; Comstock v. Smith, 7 Johns. 87, and cases cited in note; Parker v. Crane, 6 Wend. 647.

Again; "where the consideration is executed, unless there has been an antecedent request, no action is maintainable upon the promise, for a request must be laid in the declaration and proved, if put in issue at the trial."—Child v. Mosely, 8 Term Rep. 610; Stokes v. Lewis, 1 Term Rep. 20; Naish v. Tatlock, 2 H. Black. 319; Hayes v. Warner, 2 Str. 933; Richardson v. Hall, 1 B. & B. 50.

It will be found on examining the condition of the bond that it acknowledges "Carr guarantied for Walker in, through and by the said Wyley's influence and persuasion," and this express promise is founded on that fact, and it brings the case fully up to the rule laid down in the above cases. It is not necessary that the defendant should have requested plaintiff to do some act beneficial to him, in order to support a promise to pay, subsequently made.

As to moral obligation being sufficient consideration for subsequent express promise, see Vance v. Wells, 6 Ala. 737; Same v. Same, 8 *ib.* 399; Harris v. Davis, 1 *ib.* 257; Westmoreland v. Davis, 1 *ib.* 299; Barron v. Vantvert, 13 *ib.* 232.

RICE & MORGAN, *contra:*

1. The instrument sued on, and set out fully on oyer in the demurrer, was executed in Georgia. No averment is made as to any statute law of Georgia. The common law is presumed to be in force there, and by the common law the said instrument is void for uncertainty, and also for want of sufficient consideration. It is *nudum pactum.*—Beall & Co. v. Ridgway, 18 Ala. 117; Holt v. Robinson, 21 *ib.* 106; Kirksey v. Kirksey, 8 *ib.* 131; Duncan v. Hall, 9 *ib.*

2. A mere moral obligation, though coupled with an express promise, is not a sufficient consideration to support a bill, note or bond between the same parties. An express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original cause of action, if the obligation on which it is founded never could have been enforced at law.—Nash v. Russell, 5 Barb. S. C. R. 556; 21 Ala. 106; 7 Conn. 57; 11 Adolph. & Ellis 438; 3 Bos. & Puller 249, note A; 7 Term Rep. 348. There was no legal obligation—no legal consideration. A legal obligation is "one inferable by law."—5 Barb. S. C. R. 558, *supra*; 18 Ala. 117, *supra.*

3. It is clear that, until the bond was executed, Wyley was not legally liable in any manner to Carr. If there was any consideration, it was "a past consideration." The consideration of the bond is recited and shown in the condition thereof, to-wit: that Carr had previously guarantied Walker's bid "in, through and by said Wyley's influence and persuasion," which said contract Walker had previously refused to execute. This consideration being thus shown by the bond, and being set forth on oyer and demurrer, and being insufficient, the court was authorized to sustain the demurrer.—14 Ala. 23.

4. A "bid for carrying the mail on route 3315, from Gainsville to Spring Place," is not a contract. Nothing else like a contract by Walker, is shown by the bond. Yet the bond says: "which said contract the said J. W. Walker has refused to execute." Parol evidence cannot be received to add to or vary the provisions of the bond. The bond itself, without parol evidence which does add to or vary it, is wholly uncertain, if not senseless and unmeaning. It must, for this uncertainty, be held void.

5. But if the bond is not void for uncertainty, what does it mean? The bond provides that it shall be void "if the said Wyley does and will stand betwixt the said Carr and the General Post Office Department, so that the said Carr has no more trouble and expense, and releases the said Carr from all responsibility in said matter." Now what is meant by the words "said matter"? There is nothing in the bond to which those words can refer, except the guaranty of Carr for Walker on his bid for carrying the mail. If the bid was the "said matter," then Walker had the right to "refuse to execute" it at any time before its acceptance, for no bid is binding until accepted.

6. If any action can be maintained on said bond, it is covenant, not debt.

7. The plaintiff makes profert of his letters testamentary in his declaration, but does not aver in what State his letters were granted. The legal implication from his declaration is, that his letters were granted in Alabama, where he sues; but on oyer and demurrer, it appears his letters were granted in Georgia.

GOLDTHWAITE, J.—It is true that a mere moral obligation, although coupled with an express promise, is not a sufficient consideration to support a contract, (Story on Prom. Notes § 185,) but a moral obligation, in this sense, we understand to be one which, if connected with an express promise to pay at the time of its creation, could not have been enforced for the want of a sufficient consideration alone, and not from any defence which the law would allow, but not require, the party against whom it existed to assert.—Story on Prom. Notes 185; Story on Bills of Exchange § 182, and cases there cited.

In the present case, the condition of the bond recites, that the guaranty was given "in, through and by the influence and persuasion" of the testator of the defendant in error, which is, in legal effect, equivalent to its being given at his request.—The consideration, therefore, of the contract sued on, is the guaranty of a third person given by the plaintiff in error at the request of the testator of the defendant in error, and this, especially when connected with an express promise of indemnity, by the party at whose request the responsibility was assumed, is not a moral, but a valuable consideration.—Brown v. Adams, 1 Stew. 51; Chapin v. Merrett, 4 Wend. 657; Chitty on Bills 74; Story on Prom. Notes § 186.

But it is said the bond is void for uncertainty. The condition of the bond is in these words: "That whereas the said Carr guarantied for John W. Walker, on his bid for carrying the mail on route 3315 from Gainsville to Spring Place, in, through and by said Wyley's influence and persuasion, which said contract the said J. W. Walker has refused to execute: Now, if said Wyley does and will stand betwixt the said Carr and the General Post Office Department, so that the said Carr has no more trouble and expense, and releases the said Carr from all responsibility and damage in said matter, then the above bond to be void." The instrument certainly is not technically drawn, but, had it been ever so technical, we doubt if the intention of the parties would have been any clearer. That the word "bid" was used for "contract" is evident from the subsequent use of the last word, and "said matter" in the conclusion of the instrument can legitimately refer to nothing else than the guaranty of the contract of Walker by the obligee. The plaintiff in error had, at the request of the obligor, guarantied the contract of Walker for conveying the mail on the route designated, and the latter having failed to comply with his undertaking, the stipulation of the other party is, to stand between the obligee and the Post Office Department for all damages growing out of his guaranty.

The other objections taken to the declaration may be briefly disposed of. Debt can be sustained on a bond like this, (1 Chitty's Pl. 109; Herndon v. Forney, 4 Ala. 243,) and the foreign executor, under our statute, (Clay's Dig. 227,) has the right to prosecute his action in our courts. The effect of the profert of the letters testamentary is, to bring them into court, and operates precisely the same as if they had been set out in the declaration.

It follows from these views, that the court below erred in sustaining the demurrer; the non-suit must, therefore, be set aside, the judgment reversed, and the cause remanded.

HANNA, ADM'R, *vs.* PRICE ET AL.

1. To authorize a summary judgment against the sureties of an administrator, the record must show the judgment against the administrator, the bond by which the sureties have become liable, the issue of an execution on the judgment against the administrator, and its return "no property found."
2. A memorandum in the hand-writing of the clerk, on the margin of the execution docket, is not evidence of the issue and return of an execution, unless its existence at one time and subsequent loss are first proved.
3. A decree of the Orphans' Court, rendered prior to the passage of the act of 1846, in favor of an administrator *de bonis non* against a preceding administrator, for moneys received in the course of administration and unaccounted for, is not merely voidable, but void.

ERROR to the Court of Probate of Benton.

THIS was a proceeding by *supersedeas* in the court below, at the instance of Williams, one of the defendants in error, by way of petition, praying that a certain execution in favor of the plaintiff in error, and against the defendants, might be superseded and quashed. The petition presents the following grounds as a predicate for its prayer: It sets out the execution then running, in which said execution it is recited that it is issued on a judgment or decree of the Orphans' Court of Benton County, rendered on the 17th day of January, 1845, at a special term of said Orphans' Court, for the sum of $620 24 in favor of the plaintiff in error, and against Wm. C. Price, *ex officio* administrator of the estate of James Riddle, deceased, and against the petitioner and one Haynes, as his sureties on his official bond as sheriff of Benton County. The petition denies the truth of the recitals of the execution, and alleges that there is no such judgment in existence as the one recited, but that the judgment was against Price alone, and not against him and his sureties.

It denies that any execution was ever regularly issued on said judgment against said Price, and returned "no property found" as to him, so as to authorize a statutory judgment and execution against his sureties on said judgment; states that, on the margin of said judgment or decree appear certain entries,

as follows: "*Fi. fa.* April 22, 1845, to W. J. Willis, sheriff." "*Fi. fa.* returned 'no property found,' April 25th, 1845." "*Alias fi. fa.* issued 28th April, 1845, to W. J. Willis, sheriff, against sureties." "*Pluries fi. fa.* issued Dec. 4, 1845, to W. J. Willis." "*Pluries* returned 'no property found,' Jan. 17, 1846." "*Alias pluries fi. fa.* issued 19th December, 1850, to C. Sublett, sheriff." But it denies that said entries are evidence of an actual issue and return of said executions, and that no other evidence of said issue and returns appear of record than as above stated; alleges that, if executions were in fact issued on said judgment, they were irregularly issued, and void as to the sureties of said Price.

The petition further alleges, that the judgment rendered against Price, the principal, being in favor of the plaintiff in error as administrator *de bonis non*, and not in favor of the heirs or distributees of the estate, is void, as there was at the date of said judgment no law authorizing the court to render such a judgment in favor of said plaintiff in error, and therefore an execution issued on said judgment, as against the petitioner and said Haynes, sureties of said Price, is also wholly void.

The petition further alleges, that the claim sought to be enforced against the sureties by the execution is barred by the statute of limitations of six years, as more than that space of time has elapsed since the liability, if any, accrued by reason of the default of the said Price; and further, that the plaintiff in error has made a final settlement of the estate, and been discharged from any and all liability on account of said judgment or decree against the said Price, and therefore he is not the proper party to enforce the liability against the sureties of said Price, if any such liability exists, but that the heirs or distributees of the estate of the said Riddle are; and for these reasons he prays that the execution be superseded and quashed.

The plaintiff in error demurred generally to the petition, and also particularly to each portion of said petition setting out a separate and distinct ground for quashing the execution. These demurrers were overruled; and on the trial a bill of exceptions was taken, from which, as well as from the agreement of counsel, the following facts appear:

On the 17th day of January, 1845, a judgment was rendered in favor of the plaintiff in error, as administrator *de bonis non*

of the estate of Riddle, and against said Price, as administrator *ex officio* as sheriff of Benton County, for the sum of $620 24. Then there was read in evidence the entries above recited, of the issue and returns of the several executions as above recited, proved to be in the hand-writing of the person who was clerk of the Orphans' Court of Benton County at the time the same purport to have been made. It was proved that the original execution was lost. There was also produced and read in evidence what purports to be a *pluries fi. fa.*, dated the 4th December, 1845, against all of the defendants, Price, Williams and Haynes, and reciting a judgment existing in said court against all of said defendants; and also the *alias pluries fi. fa.* which is the one sought to be superseded and quashed. The facts agreed upon between counsel are: That the defendants, Williams and Haynes, became the sureties of said Price, as sheriff of Benton County, on the 29th day of July, 1849; that said bond was duly approved, and is to be considered as in evidence; that said Price acted as sheriff under said bond, until the expiration of his term of office, which was the 4th of March 1842, when his connexion with the estate of Riddle, of which he had been *ex officio* administrator, ceased; Price had been sheriff of Benton County before the defendants, Williams and Haynes, became his sureties, and on the 26th day of December, 1839, he was, as said sheriff, appointed administrator with the will annexed of the said James Riddle, deceased, and had acted as such continuously from that date until the 4th of March, 1842, when he ceased to be sheriff of said county. The judgment against the said Price in favor of the plaintiff in error as administrator *de bonis non*, rendered the 17th January, 1845, was for moneys collected by the said Price as such administrator and not paid over or accounted for in any manner whatever.

The court below quashed the execution on the above evidence, and the plaintiff in error here assigns for error the ruling of the court in rendering said judgment, and also the overruling of the several demurrers to the petition for the *supersedeas*.

A. J. Walker, for plaintiff in error:

The petition does not set forth any facts showing the illegality of the execution. The mere fact that there was no judg-

ment of record against the sureties, is insufficient to authorize a *supersedeas*, because there may be an execution against the principal and his sureties, in the absence of a judgment of record corresponding as to parties with the execution. The officer issuing the *fi. fa.* must be presumed to have acted legally: it must be presumed that he had the authority prescribed by the statute for the issue of the process. The *onus* is on the petitioner, to show that the clerk had not authority for his act. Hence, the averment that there was no judgment of record, is not enough: it does not negative the existence of the facts which constitute the statutory judgment, and which must be presumed to exist. The law does not require a recital in the execution of the facts which authorize its issue.—Clay's Dig. 305 § 25; 16 Ala. 368; 3 *ib.* 285; 12 *ib.* 561.

The averments that no legal execution had issued within a year and a day, and that petitioner was satisfied the executions were not legally returnable, must be disregarded, because they are conclusions, not facts. The petition does not state that the execution against Price, the principal, was returnable into the Orphans' Court: the statement is, that it was the custom of the clerk, in similar cases, to issue executions returnable into the Orphans' Court.

The absence of liability cannot be inferred, in favor of Williams and Haynes, because they became the sureties of Price two years after his appointment as administrator. Notwithstanding that fact, his default may have taken place after they became his sureties, and in that event they would be liable.

The judgment against Price was voidable, not void. It might have been reversed on error, because not rendered in favor of the person designated by law; but the court had jurisdiction of the parties and subject matter, and hence its judgment is simply voidable. The statute authorizing executions against the sureties of administrators, does not prescribe the plaintiff: the only pre-requisites are, a decree on final settlement and a return of *nulla bona* against the principal.—6 Porter 219; 19 Ala. 228; 11 *ib.* 579; Clay's Digest 305 § 45.

The bar of the statute of limitations of six years is not shown by the averment and proof that Price's office expired six years before the issue of the particular execution sought to be superseded, as previous executions had issued. The plea of the

statute cannot be sustained by proof of the expiration of six years before the issue of the *pluries*. It might be otherwise, if six years had elapsed before the return of *nulla bona* on the execution against him. The return of *nulla bona* on the execution against the principal, perfected a judgment against the sureties; and they must show that the bar was complete at the date of the return of *nulla bona*, because on that day there was a judgment against them.—Thompson v. Bondurant, 15 Ala. 351; Clay's Digest 304.

The statute of limitations of six years does not apply in behalf of a sheriff's sureties, as to his defaults as administrator. When the sheriff is appointed administrator, his official bond becomes an administration bond, it is not the bond of a "public officer," for this purpose. Otherwise, the security provided for those interested in estates administered by the sheriff, is less than the security provided in other cases. The statute says, that judgment may be rendered on his bond "in the same manner as on other bonds of administrators."—Digest 222 § 10, 329 § 91.

John T. Morgan, *contra*:

The order appointing Price administrator does not show that he was sheriff of Benton County.

There is no evidence in the record that his term of office had expired before Hanna was appointed, or that he had been removed. This is fatal to the jurisdiction of the court: it could not appoint Hanna, until Price was removed, or his letters in some way revoked.

The court had no jurisdiction to render a judgment, and award an execution, in favor of an administrator *de bonis non*, in January, 1845, and the act of 1846 has no effect to cure the proceeding.—Price v. Simmons, 13 Ala. 750; Willis v. Willis, 9 Ala. 722. The money collected by Hanna would not be assets in his hands, especially as he had made final settlement before the *fi. fa.* issued.

The sureties of Price can make the question of jurisdiction. The motion, as to them, does not come up collaterally, but directly. This is the first opportunity they have had to contest their liability, and the proceeding is in the nature of a suit as against them. This being a summary, statutory proceeding,

every fact necessary to support the jurisdiction of the court must exist at the time they are sought to be charged: no intendments can be made to support it. If it be said that the judgment was conclusive as to Price, it must be because of his mispleading or failure to plead; and while he might stand charged individually by the judgment, he could not be charged as an administrator. Neither would the rights of distributees or legatees be affected by a payment of this judgment to Hanna; they might proceed again.—Poacher v. Weisinger, 20 Ala. 102; Crenshaw v. Hardy, 3 Ala. 653.

There can be no judgment without a record to support it. The only evidence to support a statutory judgment against the sureties of an administrator is, the judgment against the administrator, the issue of an execution thereon, and its return "no property found." If the *fi. fa.* was issued and lost, that fact should appear, and its contents be proven. The mere entry on the minutes, in the absence of other proof, was insufficient to support such a judgment.—Jenkinson v. Gray, 16 Ala. Rep. 104.

The execution should have been superseded, because it does not appear that any execution was issued within a year and a day after the return of "no property found" against the principal. The entry on the minutes "*alias fi. fa.* against sureties, April 28, 1845," is no proof that execution issued against them.

The appointment of a sheriff as administrator attaches to the office, and not to the person. When his office as sheriff expires, he can do no act to render his official sureties liable: his letters are revoked by operation of law. The subsequent act in relation to the statute of limitations on sheriffs' bonds, includes every character of liability against them.—Governor v. Stonum, 11 Ala. 681. And the statute begins to run, when the liability of the surety is conclusively ascertained. In this case, the default of the sheriff must have been committed while he was in office, prior to the 4th March, 1842, and the *alias pluries fi. fa.* was issued in 1850, and was the first process of any validity on its face which has been issued on the judgment.

GIBBONS, J.—The first question presented on the present record is, whether it affords sufficient evidence to authorize the

issue of an execution against the sureties of Price, on the judgment rendered against him in the Orphans' Court of Benton County on the 17th of January, 1845, in favor of the plaintiff in error, as administrator *de bonis non* of the estate of the said James Riddle, deceased.

The evidence disclosed by the record is, the judgment against Price, the bond of Price as sheriff, on which the defendants Williams and Haynes are sureties, the *pluries fi. fa.* issued the 4th December, 1845, against all of the defendants, reciting the existence of a judgment against all of the said parties in the Orphans' Court of Benton County; and the *alias pluries fi. fa.* issued the 19th of December, 1850, being the one sought to be superseded and quashed. There is the additional evidence of the memoranda made upon the margin of the minutes in the hand-writing of the person who was clerk of the court at the time the same purport to have been made, as follows: "*Fi. fa.* issued April 22, 1845, to Wm. J. Willis, sheriff." "*Fi. fa.* returned "no property found," April 25, 1845." "*Alias fi. fa.* April 28, 1845, to Wm. J. Willis, sheriff, against securities." "*Pluries fi. fa.* December 4th, 1845, Wm. J. Willis, sheriff." "*Pluries fi. fa.* returned "no property found," January 7, 1846." "*Alias pluries fi. fa.* issued 19th December, 1850, to C. Sublett. Returned enjoined the 19th February, 1851. C. Sublett, sheriff."

The above constitutes all of the evidence in support of the regularity of the execution, and on which the court below acted in quashing the same.

The act of 1832 (Clay's Dig. 305 § 45) says: "Whenever any execution shall have issued on any decree made by the Orphans' Court, and final settlement of the accounts of executors, administrators or guardians, and is returned by the sheriff no property found generally, or as to a part thereof, execution may and shall forthwith issue against the securities of such executors, administrators or guardians."

In order to sustain an execution against the sureties of an administrator, on a judgment or decree against such administrator, the record must show: 1st, the judgment; 2nd, the bond by which the sureties have become liable; and, 3rd, the issue of an execution on said judgment against the principal, and return thereof by the sheriff "no property found,"—

Thompson v. Bondurant & King, 15 Ala. 346. All these facts must concur, in order to sustain the summary statutory proceeding against the sureties. In the case before us, we regard the evidence of the issue of the execution against Price, and the return of no property found thereon by the sheriff, as entirely too defective. On the proof made upon this point, as disclosed by the bill of exceptions, the court was, in our opinion, warranted in regarding the same as offered insufficient to establish the fact that an execution had in fact been issued on said judgment against the said Price, and returned no property, as indicated by the memorandum of the clerk.

Waiving for the present the question as to the regularity of the execution, as to the time when it was made returnable, our conclusion is, that the evidence was insufficient to establish the fact that an execution ever issued on said judgment against said Price alone.

Where written documents are attempted to be proved, which are alleged to be lost, the commencement of the proof is to show that such documents actually existed by testimony directly to the point; and then, their loss being proved, it is competent to prove their contents. But in the present case, the mere memorandum of the clerk upon the margin of his docket or his minutes we cannot regard as legal evidence of any fact, until it is shown that such entries are the best evidence the nature of the case admits of. This is not shown in the present case, and we must regard the record as containing no proof that any execution ever issued on the judgment against the said Price alone, or that the same was returned as to him no property found.—It follows, as a necessary consequence, that the execution was correctly quashed as to the sureties, Williams and Haynes.

The next question presented is, whether it was correctly quashed as to Price. The judgment which is sought to be enforced against the parties defendants, by the execution in question, is one rendered on the 17th January, 1845, against the said Price, as former administrator of the estate of James Riddle, deceased, and in favor of the plaintiff in error, as administrator *de bonis non* of said estate. The judgment itself shows that it was for a balance of money in the hands of Price received in the course of his administration and unaccounted for. The question now arises, whether the court, at that date, had

any power to render such a judgment. That such a judgment was erroneous, has several times been directly decided by this court.—Price v. Simmons, 13 Ala. 750; Willis v. Willis, 9 Ala. 722. These decisions go upon the idea, that the Orphans' Court, being one of limited jurisdiction, can only proceed to render judgment in such cases as the statutes specially authorize; and it would seem to follow, that whenever it exceeded its powers, its judgment would be not merely voidable, but void. Prior to the passage of the act of 1846, the Orphans' Court had no power to order money in the hands of one administrator either resigned or removed, said money being realized from the assets of the estate, to be paid over to the succeeding administrator; nor could it render any judgment in favor of such succeeding administrator against the preceding one, that would be valid so as to bar a recovery from the same party by the heirs, legatees or distributees of the estate, who were entitled to receive from the preceding administrator an account of his administration, and the balance, whatever it might be, in his hands; and such judgment, so rendered in favor of the administrator *de bonis non*, was erroneous, from the fact that the Orphans' Court had no jurisdiction to render it, and was consequently not merely voidable, but void. This view of the case is conclusive, to show that the execution was a nullity as to all of the parties, and was correctly quashed as to all. The decision of the two questions, thus presented upon the ruling of the court below in quashing the execution, necessarily disposes of the questions raised upon the demurrers to the petition for the *supersedeas*, as those questions are indentical with those decided. It follows that the demurrers were correctly overruled. As the questions already decided dispose of the entire case, we do not deem it important to consider the other question raised by the petition and relied upon in the argument.

The judgment of the court below is therefore affirmed.

CHILTON, C. J., not sitting.

LINDSEY *vs.* JONES.

1. A contract by an attorney to save his client harmless from all responsibility in a suit pending against him or to refund his fee, if valid, extends only to such liabilities as the law would recognize and enforce ; and if the client suffers a judgment to be rendered against him in favor of another attorney whom he had never employed, for professional services in the same suit, he cannot resort to his contract of indemnity.

APPEAL from the Circuit Court of Covington.

Tried before the Hon. NATHAN COOK.

THE appellant, Lindsey, sued Jones to recover fifty dollars and interest, and the parties agreed upon the facts, which were submitted to be tried by the court without a jury, and which were substantially the following:

The defendant, who is the surviving co-partner of the late legal firm of Jones & Lewis, executed in the name of the firm the following receipt: "GENEVA, Coffee County, 26th September, 1844. Received of John Lindsey $50, in full for our fees in quashing a *scire facias* against him, B. T. Adkinson, Henry Poulson, W. Lightfoot and George Kilpatrick, upon a forfeited bond; and we agree to save harmless the above parties from all further responsibility in said cause, or obligate to refund back the said sum of fifty dollars, with interest from this date. (Signed) Jones & Lewis, Attorneys at Law."

After this receipt was given, judgment was rendered upon a *scire facias* issued on said bond in the receipt mentioned against Lindsey and the other obligors; the case was taken to the Supreme Court, and was reversed, the same being reported in 15 Ala. 43.

It was further agreed, that an attorney appeared for the plaintiffs in error; that no other counsel appeared for them; that neither of the parties employed him, but he rendered valuable services in the case for the plaintiff; that said attorney sued Lindsey in the Coffee Circuit Court for his fee therefor, of which suit Jones was notified, and recovered a judgment against Lindsey in 1850, for fifty dollars, which he has paid, but which Jones

refused to pay him, or to indemnify him; Lindsey now claims the fifty dollars and interest, mentioned in the receipt, on the ground that he and his co-defendants in the *scire facias* had not been indemnified and saved harmless from all further responsibilities in said cause, in that the said Jones had not paid the money which he had been compelled to pay out, &c.

The Circuit Court held, that these facts did not entitle the plaintiff to recover, and gave judgment for cost against him; from which he appealed to this court, and here assigns the judgment on the facts for error.

MARTIN, BALDWIN & SAYRE, for appellant.

WATTS, JUDGE & JACKSON, for appellee.

CHILTON, C. J.—It is perfectly clear that the law arising upon the agreed state of facts is adverse to a recovery on the part of the plaintiff; for, conceding the contract to be valid, he seeks indemnity on account of a payment which the law did not compel him to make, but which we must, under the facts agreed, intend he voluntarily submitted to make. True, a judgment was rendered against him, for services in the Supreme Court; but if it be true that these services were rendered by an attorney not employed by him or some one for him, he had a successful defence. If he failed to make such defence, and submitted to pay, he cannot resort to his contract of indemnity. This contract extends only to such liabilities as the law would recognize and enforce, and not to such as originated in the caprice or negligence of the plaintiff. If, having a good defence, he failed to make it, he cannot charge the defendant with the consequence of his neglect. He alone must bear it.

Judgment affirmed.

OWENS *vs.* COLLINS & LANGWORTHY.

1. When money is advanced by one partner out of his individual funds, to be invested with other moneys belonging to the partnership in the purchase of real estate for the joint benefit of all the partners, and the purchase is made by another partner, who takes the legal title in his own name, a trust is created in favor of the individual members of the firm, which a court of equity would enforce.
2. But the partner thus advancing his money would have the right, at any time before the appropriation was actually made, to change his intention, and direct a different application of it; and the subsequent application of his funds in the manner which he had first authorized, would create a trust, if at all, in his favor alone.
3. When a bill is filed to enforce a trust growing out of partnership transactions between complainants and defendant, or a joint trust in favor of complainants individually, and the evidence shows a separate trust in favor of one of the complainants only, the discrepancy between the *allegata* and *probata* is fatal.
4. A trust created by parol, whether express or implied, may also be discharged by parol.
5. When lands are purchased with partnership funds, and for partnership purposes, equity regards them as partnership property, and it is immaterial in whose name the purchase is made; but when the bill alleges both facts, while the proof shows a purchase by one partner for partnership purposes with his individual funds, the proof does not sustain the case made by the bill.

ERROR to the Chancery Court of Montgomery.

Heard before the Hon. J. W. LESESNE.

The bill was filed by the defendants in error for an account of copartnership dealings, and to enforce a trust in certain lots in the City of Montgomery, which the bill charges were purchased by Owens, and the title taken in his own name. The bill also charges in relation to these lots, that it was agreed between the parties, that the purchase should be made for their joint use and benefit, and for that purpose that certain moneys in the hands of Owens belonging to Collins should be used, Owens having the management of the whole matter; that the purchase of the lots was made by Owens in September, 1844, as the partner of the complainants, with the partnership funds, and for the joint benefit of the partners; that after the purchase he divi-

ded the lots into three parts, one of which was assigned to one Allen, who was interested in the purchase, one set apart for himself, and the other for the complainants; that Owens concealed the fact of the purchase from the complainants, and slandered the title to induce them to abandon the purchase; that he holds the lots as his own, &c.

The answer of Owens denies the agreement that he was to buy the lots for the benefit of the firm, but insists that the agreement was, that if Collins should collect certain moneys, and the titles to the lots were good, then he was to purchase with the money of Collins, retain two-thirds of the lots as his own, and the remaining third to be for the firm; that this was the understanding until August, 1846, when the authority to use the money of Collins for the purchase was revoked by him, which put an end to the agreement; that he made the purchase on his own account, and with his own money, and he also alleges, that in November, 1846, Collins, with a full knowledge of the purchase, demanded the money left in his hands; and that a portion of it was, by his direction, invested in the purchase of a note, Collins at the time disclaiming all interest in the lots, but claiming the money.

The evidence upon the points in controversy, is sufficiently referred to in the opinion of the court. The decree directed an account of the partnership concerns, and also decreed the title of one-third of the lots purchased to the complainants, and the delivery of the possession accordingly.

The decree of the Chancellor is here assigned for error.

Elmore & Yancey, for plaintiff in error:

1. There is a resulting trust in the lands, only when the purchase is made with another's money, furnished at the time for the purpose, under some agreement to that effect between the parties.—2 Story's Eq. § 1201; Wallace v. Duffield, 2 Serg. & R. 529; Kisler v. Kisler, 2 Watts 323; Graves v. Dargan, 6 Dana 331.

2. A subsequent tender or reimbursement would be evidence of some contract, but creates no trust.—Botsford v. Burr, 2 Johns. Ch. 405; Foster v. Trustees &c., 3 Ala. 302; and cases *supra*.

3. Declarations which are unequivocal, that one purchased

for another, unless there was an agreement or advance of money for that purpose, do not create a trust.—Taliaferro v. Taliaferro, 6 Ala. 404; and cases *supra*.

4. Trusts must be certain and definite. Although a trust of some kind is clearly created, yet, if its terms are so vague that the character, subject and objects of the trust cannot also be clearly ascertained, it must fail.—2 Story's Eq. § 979 *et seq.*

5. A declaration of trust purports to be, and is in form and substance, a complete transaction, and requires nothing more to be done. There must be an intention to create a trust, and the act or declaration to carry out that intention must not only be completed, but must create the trust.—McFadden v. Jenkins, 1 Keen (15 En. Ch. R.) 558; Walwyn v. Coutts, 3 Sim. (5 En. Ch.) 14; Beatson v. Beatson, 12 Sim. 291; Coleman v. Sarel, 1 Vesey 50; Ellison v. Ellison, 6 *ib.* 656; Antrobus v. Smith, 12 *ib.* 46; Pulvertoft v. Pulvertoft, 18 *ib.* 149; Edwards v. Jones, 1 M. & Cr. 226; Dillon v. Coppin, 4 *ib.* 647; Cunningham v. Plunkett, 2 Y. & C. 245.

6. If the declaration or trust is incomplete, a meritorious consideration is not sufficient to enforce it.—Meek v. Kettlewell, 1 Hare 474; Holloway v. Headington, 8 Sim. 324; James v. Bidder, 4 Beav. 600; Jeffreys v. Jeffreys, Cr. & Ph. 138; Caldwell v. Williams, 1 Bailey's Eq. 175; 5 Watts 389; Minturn v. Seymour, 4 Johns. Ch. 497; Agee v. Steel, 8 Ala. 948; Taliaferro v. Taliaferro, 6 *ib.* 404; Forward v. Armistead, 12 *ib.* 124; 2 Story's Eq. § § 706, 793, 973.

7. The intention may be proved by the act or declaration itself, if it be completed, but if necessary to inquire into its origin, then there must be a valuable consideration to support it.—See cases cited on third point, *supra*, particularly McFadden v. Jenkins, 1 Keen 558.

8. The intention may be proved by the act itself, or by parol declarations, or by circumstances; but it may also be rebutted in a like manner, even though the act or declaration on its face creates a trust.—Botsford v. Burr, 2 Johns. Ch. 405; Steen v. Steen, 5 *ib.* 1; Squire v. Campbell, 1 Myl. & Cr. 489; Phillips v. Craymond, 2 Wash. C. C. 441; White v. Carpenter, 2 Paige 217; Page v. Page, 8 N. Hamp. 187; Foster v. Trustees &c., 3 Ala. 302; Bishop's Heirs v. Bishop's Adm'r, 13 Ala. 475.

9. When the party does not intend to give or part with the dominion of the property, he may retain it, although he may have executed a deed and declared the trusts, when it is voluntary.—Walwyn v. Coutts, 3 Sim. 14; Kennedy v Kennedy, 2 Ala.; Hughes v. Stubbs, 1 Hare 476; Gaskell v. Gaskell, 2 Y. & J. 502, cited in Law Library for July, 1849.

10. For specific performance, the contract must be proved and performed by the complainant; and to take it out of the statute of frauds, when it is parol, he must have paid all the purchase money, and been let into possession under the contract. —Goucher v. Martin, 9 Watts 106; Haslet v. Haslet, 6 Watts 464.

11. To obtain performance, there must be an agreement for a specific price, and for a specific piece of land or interest therein, and the terms of the contract must be certain.—2 Story's Equity § § 742, 751, 757, 761, 762, 764, 769, 770, 771, 793 a; Batten on Specific Performance 60, 108; 5 Beav. 433; Thompson v. Thompson, 1 Coll. 380; Sparling v. Parker, 16 Law J. N. S. Eq. 13.

12. When the answer denies the existence of the parol contract, and insists on the statute of frauds, the bar is complete. 2. Story's Eq. § 758, and cases cited in note.

13. A trust or interest in lands may be waived or discharged by parol. The statute interposes no bar to this.—Botsford v. Burr, 2 Johns. Ch. 406; Price v. Dyer, 17 Vesey, 356; Phillips v. Craymond, 2 Wash. C. C. 445; 2 Story's Equity § § 1202, 1262, 1263.

14. A party having a resulting trust in lands, has the right to elect which he will take, the money or the lands, and having once elected he is bound by it.—2 Story's Equity § § 1262, 1263.

15. If relief is denied to one complainant, the bill must be dismissed as to all.—Hardeman v. Sims, 3 Ala. 747; Wilkins v. Judge, 14 Ala. 135.

T. Williams, *contra*:

1. The principle of trust and trustees should be applied to the parties in this case, upon the equitable principle that where one takes a conveyance in his own name, which he undertakes to obtain for another, equity will consider him as holding it in

trust for his principal.—2 Story's Equity § 1211, and authorities there referred to. This principle is illustrated by a great variety of cases in the books, many of which will be found collected in Kennedy v. Kennedy, 2 Ala. R. 588. If these three partners had placed money in the hands of another person, to be applied by him in making this purchase for them, and he should make the purchase, taking the title in his own name, and afterwards refuse to convey, would not a court of equity compel him? and if a partner is thus entrusted, and thus promises, does he occupy a better position?

2. Where real estate is purchased for partnership purposes, and on partnership account, it is wholly immaterial, in the view of a court of equity, in whose name or names the purchase is made: whether in the name of one partner, or of all the partners, or of a stranger jointly with one partner, it is equally deemed partnership property.—2 Story's Equity § 1207, and cases there cited; Hoxie v. Carr, 1 Sum. 182 to 186; Foster v. Hale, 3 Vesey 696; 5 Vesey 308. In the case at bar, the answers and proof show very clearly that the partners considered the purchase of these lots as necessary to the success of the partnership; that Owens, one of the partners, was to make the purchase; that he had in his own hands all the funds of the partnership, and also those of Collins, with which to purchase. A trust, therefore, results, by operation of law, for the benefit of the partnership. The rule is the same in the case of joint purchasers.—2 Vesey & B. 388; 3 Pr. Williams 158; 2 Story's Equity § 1206; Lee v. Nuttall, 1 Russ. & Myl. 53.

GOLDTHWAITE, J.—The case made by the bill is, that the complainants, Collins and Langworthy, and the defendant, Owens, being in co-partnership in the keeping of a livery stable, made an agreement to purchase certain lots adjoining the one occupied by them in carrying on their business, for the joint benefit of all the partners; that certain moneys in the hands of Owens, belonging to Collins, amounting to about four hundred dollars, were by his direction appropriated to the purchase, and that the balance of the purchase money was paid by Owens out of the co-partnership funds, and the titles taken by him in his own name.

Regarding the directions of Collins, in relation to the appro-

priation of his separate funds, as an advance *pro tanto* to the firm, it is perfectly clear that the investment of these funds, with other moneys realized by the firm from the co-partnership business, under the agreement as charged, would create a trust in favor of the individual members of the firm, which would be enforced in a court of equity, in which court the person holding the legal title would be held as the mere trustee, and the partners as the *cestuis que trust.*—Hoxie v. Carr, 1 Sum. Rep. 103; 2 Story's Eq. § 1207.

The purchase of the lots is admitted; and while we regard the evidence as sufficient to establish the fact that the money belonging to Collins in the hands of Owens was used by the latter in part payment of the consideration, we think it equally clear from the evidence that the balance of the purchase money was paid by Owens from his individual funds.

We also regard it as a clear proposition, that if Collins merely authorized Owens to use his money in the purchase of the lots, for the benefit of the firm, he had the right at any time before the appropriation was actually made to change his intention, and make a different application of the funds. The money remained his until the investment was made, and until then it would be under his control.—Williams v. Everett, 14 East 582; Scott v. Procter, 3 Merivale 652. This being the law, it follows necessarily, that if the funds of Collins were before their appropriation, by his direction, withdrawn from the purpose for which he had originally intended them, the subsequent use of these funds by Owens, if it created any trust at all, raised one in favor of Collins alone.

In the last argument of this case, it was insisted that there was no evidence that Collins had withdrawn his funds in the hands of Owens, from the use for which he had at one time designed them, that is, as an advance to the firm for the purpose of purchasing the lots in question. We have again carefully examined the testimony upon this point, and are confirmed in the correctness of the conclusion expressed in our first opinion.—It is to be remembered, that the funds to be used in the purchase were the proceeds of a draft or order given by Collins to one Coster, for money which was coming to the former, amounting to about four hundred dollars; and it is not pretended that Owens at any time had in his hands of the individual moneys of

Collins any other than the proceeds of this draft. On the 9th of August, 1846, and before the purchase, which was made in September of the same year, Collins writes to Owens, and after detailing with some degree of particularity the various and unsuccessful efforts he had made to raise funds from different sources, he makes a different appropriation of a portion of his funds in the hands of Owens, and directs him "to hold on to the remainder of the draft, in case any thing should happen, that it may be come at at any time," assigning as a reason for these directions, "that they had been in a strain so long as to make them feel unpleasant;" and again, in the conclusion of his letter, he refers to this draft in connexion with Mr. Coster. What draft did he refer to? We hear of but one, and with that one Coster was connected. There can be but one construction placed on the letter to which we have referred. The draft which is there spoken of, was the same that was to have been appropriated to the purchase of the lots; this purpose was abandoned by Collins in consequence of unexpected disappointment: not obtaining the money from Powers, and failing to effect a loan from Steele, to both of which circumstances he refers in his letter. Regarding this evidence as conclusive of the change of direction, or the withdrawal of the funds of Collins, in the hands of Owens for the purchase, it is clear that, after these directions were received, these funds could not be considered either as an advance to the co-partnership, or as held for the joint benefit of the complainants; and if, under these circumstances, any trust was raised by the bare use of this money by Owens, it could result in favor of the person to whom the money belonged, and to him alone. It is entirely immaterial in this aspect, whether we regard the bill as filed to enforce a trust growing out of the co-partnership relations between the parties, or to enforce a joint trust in favor of the complainants. If it can enure to the benefit of Collins alone, and is outside of, or disconnected with the co-partnership, it is not the case made by the bill; and the rule is well settled, that the case proved must be substantially the same as that which is stated upon the record.—Dan. Ch. Pr. 1000; Wilkins v. Judge, 14 Ala. 135.

There is another ground also, which is equally decisive of the case, at least so far as Collins is concerned. Regarding the evidence as sufficient to show that the funds of Collins were not

advanced to the firm, and conceding for the purposes of argument, what we think may well be questioned, that a trust resulted in his favor from the bare use of the money, the law is clear, that a trust of that description may be waived or discharged by parol; and, indeed, the rule applies to all trusts, express or implied, which are created by parol.—Walker v. Walker, 2 Atk. 98; Bottsford v. Burr, 2 Johns. Ch. R. 445; Phillips v. Crammond, 2 Wash. C. C. R. 445. The testimony shows, that after the money in the hands of Owens, belonging to Collins, had been withdrawn by the latter from the purchase of the lots, a portion of these funds were loaned to a third person, apparently with the consent of Collins; and in the latter part of October or the first of November, 1846, he tells the witness, Brooks, that he did not wish to make an investment in these lots, referring, as witness states positively and unequivocally, to the lots in question; and that Owens at the same time, by the direction of Collins, invested a portion of his money in the purchase of a note, Collins remarking that he preferred buying such paper to investing in the lots. This occurred in the City of Montgomery, where the lots were located, and after the purchase had been made, and amounted in law to a waiver or discharge of the trust.

In considering the case thus far, we have treated the equity of the complainants as based upon a trust, resulting from the use of the money of Collins by the defendant, Owens, without reference to any agreement between the parties. That there was some understanding between them at the time of the sale, we do not doubt. This is established by the letter of Owens, written by him on the 9th September, 1846, after the instructions of Collins, and by the reservation of one third of the lots for the complainants; but the difficulty on this branch of the case is, that the evidence leads the mind to no certain or definite conclusion as to the terms or character of this understanding. That Collins did not intend that his funds received by Owens from Coster should be invested on his account, is fully and clearly shown by his letter before referred to, written apparently upon the fullest consideration; and the complainants have entirely failed to establish the charge, that the balance of the purchase money was paid out of the co-partnership funds, or that any new agreement was made of the character as charged. This being the

case, if we consider Owens as the agent of the firm, and buying for the benefit of the co-partnership, we still do not see how the decree can be sustained. Apart from any influence which the statute of frauds might exercise, it is conceded that, where a purchase of lands has been made out of the joint funds of the co-partnership, and for co-partnership purposes, it is wholly immaterial, in the view of a court of equity, in whose name the purchase is made; it is there regarded as the property of the firm.—Hoxie v. Carr, *supra*.

But the charge of the bill is, in effect, that the lots were purchased with the co-partnership funds, that is, with the money of Collins advanced to the firm, and the proceeds of the business of the co-partnership, and the evidence does not sustain this allegation, as it shows a state of facts inconsistent with the idea of an advance by Collins to the firm; in other words, although the testimony may show clearly, that the purchase was made on account of the firm, it does not establish the fact that it was with the money of the co-partnership. There is, it is true, one witness who details a conversation of Owens, in which he said that the complainants had left money in his hands to buy the lot. This conversation was had before the sale, but at what time does not appear; so that it may have been before the funds were diverted from the purpose for which they had previously been intended by Collins, and may be reconciled with the directions given by him in his letter of the 9th August.

If the purchase was not made with the co-partnership funds, or with the money of Collins under the agreement as charged, the case is varied from the one which is made by the bill, and a new case made, which involves, so far as the action of the Chancellor is concerned in giving relief, principles very different from those which would govern him upon the case which the bill presents. If a bill was filed against an agent, alleging that he had purchased lands with the money of his principal, upon an agreement to that effect, for the purpose of enforcing the trust in favor of the latter, would it be doubted that, in case it was shown by the evidence, that the agent had paid his own money, relief must be denied for the want of correspondence between the *allegata* and *probata*. The same principles apply in their full force in the present case. Owens may have made the purchase as the agent of the firm; but if it was made with the in-

dividual funds of Collins, not advanced to the firm, and the money of Owens, and Collins has waived the trust so far as he was concerned, the other complainant is not entitled to relief in this suit, for the want of harmony between the allegations and the proof.

It follows that the decree of the Chancellor, vesting the title to a portion of the lots in the complainants, and directing possession of such portion of them to be delivered to them, was erroneous; that the bill as to these lots must be dismissed, and retained to take an account of the co-partnership. The conduct, however, of the plaintiff in error has not been such as to entitle him to costs in this court, which must be paid, one half by him, and the other half by Collins; and the case must be remanded to be proceeded with upon the matters of account referred.

McLAUGHLIN ET AL. *vs.* GODWIN.

1. If an administrator rents the plantation on which his intestate resided at the time of his death, when the widow's dower has not been assigned to her, the heirs at law cannot maintain an action against him for the rents.

ERROR to the Circuit Court of St. Clair.

Tried before the Hon. THOMAS A. WALKER.

THE plaintiffs in error sued the defendant in error for the rent of certain lands belonging to the estate of their father, John McLaughlin, deceased.

On the trial it was proved, that the defendant rented said lands, as the administrator of said John McLaughlin, for four years, and had not complied with the terms of the lease. The defendant offered to prove that he had made a final settlement of the administration, and on such settlement had accounted for the rent; but it did not appear that the plaintiffs, who were minors when such settlement was made, had ever had a guardian *ad litem* appointed, or that any such guardian appeared

for them. To this evidence the plaintiffs objected; but the objection was overruled, and the testimony admitted. It further appeared that the land, for which the rent was claimed, was the plantation on which the intestate resided at the time of his death, and that no dower had ever been assigned to his widow.

Upon this evidence the court charged, that the plaintiffs were not entitled to recover; to which, as well as to the ruling of the court upon the evidence, the plaintiffs excepted, and the same is assigned for error in this court.

RICE & MORGAN, for plaintiffs in error.

J. J. WOODWARD, *contra*.

GOLDTHWAITE, J.—It is unnecessary to decide the points which have been raised as to whether the lease made by the defendant in error, as the administrator of McLaughlin, was void in consequence of the requisitions of the statute (Clay's Dig. 199 § 36) not having been complied with, or whether the settlement made by him as such administrator was erroneously admitted as evidence, as, conceding that both positions are sustainable, still the record shows enough to sustain the charge of the court.

The law allows the widow to retain possession of the dwelling-house in which her husband resided next before his death, with the improvements and plantation thereunto belonging, free from molestation or rent, until she have her dower assigned her. (Clay's Dig. 173 § 7.)

This statute, it was held in the case of Inge v. Murphy, 14 Ala. 289, gave to the widow the right to the use and occupation of the lands embraced by its terms, and that she was entitled to the rents and profits although she had removed, and the lands had been rented out by another. This decision is conclusive of the case before us. The bill of exceptions shows that the land for which the rent was claimed was the plantation on which the intestate resided at the time of his death, and that the dower of the widow had not been assigned her. The plaintiffs below were not entitled to the use and occupation of these lands, and consequently could not set up any claim for rent.

The judgment of the court below is affirmed.

DAVIS *vs.* DICKEY.

1. Plaintiff sued on a note under twenty dollars, which had been given for a clock sold by him to defendant and warranted to keep good time; the clock was shown to be worthless as a time-piece, but the case alone, without the works, was worth more than a nominal sum: *Held*, that defendant might have rescinded the contract, or might claim an abatement on the note to the amount of the damage which he had sustained; but having failed to rescind, and having kept the clock, judgment must go against him for what it was actually worth.

ERROR to the Circuit Court of Benton.

Tried before the Hon. GEO. D. SHORTRIDGE.

APPEAL from a justice, on a note for thirteen dollars made by Dickey, dated 25th November, 1848 and payable to Davis on the 25th November, 1849. The case, being under twenty dollars, was tried by the court, and the record shows that, after the introduction of the note, the defendant proved it was given for a clock, and then introduced a writing of which the following is a copy: "This is to certify that the clock is to keep good time, and if it does not, I am to make it do so, either by repairs or exchange of clocks. 25th November, 1848. (Signed) D. B. DAVIS": and proved that the writing was executed by the plaintiff at the same time with the note, and referred to the clock which was the consideration of the note. He also proved that the clock did not keep time but for a very short period after it was put up; of which fact the plaintiff on being notified took out the works and put others in their place, after which the clock did not run more than twenty minutes. The witness who proved these facts also proved, that the clock for keeping time was entirely worthless, and that the defendant purchased it to keep time. On the part of the plaintiff it was proved, that the case of the clock, without the works, was worth more than a nominal value; and this being all the evidence which enters into the opinion of the court, the court gave judgment for the defendant, which judgment is here assigned for error.

A. J. WALKER, for plaintiff in error.

No counsel appeared for defendant in error.

GOLDTHWAITE, J.—The agreement on the part of the plaintiff in error was, in legal effect, that if the clock, which formed the consideration of the note sued on, did not keep time, he would make it do so, either by repairing it, or giving another clock in exchange. Had Davis failed to comply with the agreement, it would have authorized Dickey to rescind, by pursuing the proper course, (McNair v. Cowper, 4 Ala.,) or, as the case was under twenty dollars and tried upon its equity, he might have claimed an abatement upon the note to the extent of the damage he had sustained by the failure of the other party to do what he had agreed to do. From the nature of the agreement, the utmost damage which Dickey could have sustained from the failure of the other party, was the difference between the value of the clock had it kept time, and its actual value.—To entitle the defendant to a verdict, he should have shown that he had taken the necessary steps to rescind the contract, or that the clock after the repairs were made was valueless. If it was worth anything, he could not keep it and pay nothing. The evidence, however, shows, that although the clock was of no value as a time-piece, it was worth more than a nominal amount, and there is no evidence tending to prove that the defendant had done any thing to rescind the contract. Upon this evidence, the farthest that the court could have gone, was, to give judgment against the defendant for the amount which the clock was actually worth, and there was error in rendering judgment in his favor.

The judgment must be reversed, and the cause remanded.

DICKENS *vs.* BUSH.

1. In an appeal case from a justice of the peace, the judgment entry recited a verdict for plaintiff, but did not state the amount of it; on the judge's docket was a memorandum, in his hand-writing, in these words: "Jury and verdict for plaintiff, and fifteen per cent. damages;" and certain notes were found among the papers of the cause, corresponding with the pleadings: *Held*, that this evidence was not sufficient to authorize the entering of a judgment *nunc pro tunc* at a subsequent term for the amount of the notes.

ERROR to the Circuit Court of Barbour.

Tried before the Hon. ROBERT DOUGHERTY.

MOTION to enter a judgment *nunc pro tunc* by David A. Bush against Ephraim Dickens. The record shows that Bush sued Dickens before a justice of the peace, and obtained judgments against him in several cases, all of which Dickens removed by appeal into the Circuit Court. At the Spring term, 1852, a judgment was rendered in said court, as follows:

"Came the parties by their attorneys, and the plaintiff moves to consolidate this and the seven following cases, which motion is granted; and the parties having joined issue, there came a jury of good and lawful men, to-wit: &c., who upon their oaths say, they find for the plaintiff, and assess the damages at . It is therefore considered by the court, that the plaintiff recover of the defendant the said sum so assessed, and fifteen per cent. damages on the same for frivolous appeal, and also the costs of suit."

In support of his motion, the plaintiff produced the judge's docket, on which were the following memoranda in the handwriting of the presiding judge: "This and the seven following cases consolidated;" "Jury and verdict for plaintiff, and fifteen per cent. damages." It also appeared that there were several promissory notes on file, among the papers of the cause, corresponding with the pleadings.

On this evidence, the court entered judgment *nunc pro tunc*, as of the Spring term, 1852, for the amount of said notes and fifteen per cent. damages thereon, the plaintiff agreeing to remit the interest. This judgment is now assigned for error.

P. T. SAYRE, for plaintiff in error.

E. C. BULLOCK, *contra*.

GOLDTHWAITE, J.—The only question in this case is, whether the court erred in allowing a judgment *nunc pro tunc* to be entered upon the evidence as disclosed by the record.

The rule is well settled, that to authorize a judgment of this character, there must be either some matter of record, or some entry or memorandum made by or under the authority of the judge.—Andrews v. The Branch Bank, 10 Ala. 375.

The entry by the judge on his docket, of "jury and verdict for plaintiff, and fifteen per cent. damages," affords no information as to the amount of the verdict, either by itself, or when taken in connection with the notes which were found on file with the papers in the cause. The verdict may have been for less than the amount of the notes.

It is urged, however, that as it appears from the entry of the judge, that fifteen per cent. damages were awarded, and the cases were on appeal from a justice, inasmuch as these damages are only given when it appears to the judge that the appeal was taken for delay, it shows that the verdict was at least for the amount of the judgment rendered by the justice. The answer to this is, that the entry establishes simply that, in the opinion of the judge, the appeal was taken for delay; and as the facts on which the opinion was based, do not appear, it, at the most, is but a conclusion; and this court could not, in the absence of the facts upon which it was founded, say that it was correct. In other words, we cannot say whether the judgment of the court in awarding damages was right or wrong; and to amend a record upon evidence of this character would be going beyond all precedent.

The judgment must be reversed, and the cause remanded.

SACKET & SHELTON *vs.* McCORD.

1. A judgment on verdict against the plaintiff in attachment is not conclusive evidence, in a subsequent suit on the bond, that the attachment was wrongfully sued out.
2. The party excepting is only required to set out in the bill of exceptions so much of the evidence as may be necessary to show that the court erred in its ruling; and a reversal necessarily follows, unless the record also shows that no injury resulted from the error.
3. When the bill of exceptions states that the ruling of the court "was objected to" at the time it was made on the trial, it is sufficient.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. McKINSTRY.

Debt by Charles McCord against the appellants, on an attachment bond, given by them in a suit between Jeremiah Sackett and said McCord.

On the trial, "the court permitted the plaintiff to read to the jury an entry from the minutes of the present term of this court, not signed by the presiding judge, of a judgment on the verdict of a jury against the plaintiff in the attachment suit of Sackett v. McCord, the bond in which is the foundation of the present action; to which the defendants, by their counsel, objected. And the judge charged the jury, that the said entry was a judgment, and was conclusive evidence that the attachment was wrongfully sued out; to which defendants also objected, and prayed the court to sign and seal this bill of exceptions," &c.

"The matters set forth in the bill of exceptions," are now assigned for error.

P. Hamilton and Geo. N. Stewart, for appellants:

1. The judgment in the attachment suit was not conclusive evidence, against the defendants in this, that the attachment was wrongfully sued out. It was not a judgment between the same parties, that being against Jeremiah Sackett, and this against his sureties; it does not appear but that it might have been rendered on demurrer to the declaration, or on plea of payment or release, or by collusion between plaintiff and defendant. In no aspect could it be held to have other effect than as *prima facie* evidence.—4 Hawks' R. 34; *ib.* 43; 3 Yeates 128; 9 Port. 412; 2 N. H. 190; 4 Greenl. 72; 2 Rand. 313; 3 Cowen & Hill's Notes 984; 5 Monroe 266, 267; 9 Yerger 111; 6 Rand. 86; 21 Pick. 253.

2. The entry was no judgment. The result of the case still remained in the breast of the judge, until the minutes were signed; that judgment might have been set aside, and a new trial granted.

Wm. G. Jones, *contra*:

1. The bill of exceptions is to be construed most strongly against the party excepting. In what purports to be the bill of exceptions in this case, the admission in evidence of the judgment entry was "objected to" by the defendant, but not except-

ed to. So, too, we insist that the charge of the court was only "objected to," and not excepted to. Under the recent decisions of this court, it is submitted that no exception appears to have been taken in the case during the progress of the trial.—21 Ala. 200; *ib.* 358; 11 *ib.* 732; 9 Wheat. 657.

2. The judgment was admissible in evidence. The fact that the attachment suit was not prosecuted to effect was directly in issue; and the verdict and judgment in the attachment case was not only competent and admissible evidence, but the only legitimate evidence of that fact.

3. The charge of the court must be taken and construed with reference to the evidence, and the bill of exceptions is to be taken most strongly against the party excepting. The charge was given to the jury after the evidence was closed. It does not seem that the defendants offered any evidence at all. The court did not reject any evidence offered by them. They did not attempt to show that the attachment was rightfully sued out, notwithstanding the verdict and judgment in the attachment suit. So far as appears from the bill of exceptions, the verdict and judgment in the attachment suit was the only evidence before the jury. Each party rested his case there, and went to the jury. Under this evidence the court properly charged the jury that this was conclusive evidence that the attachment was wrongfully sued out. The case is argued by the counsel for the plaintiffs in error as if the court held this an estoppel, and prevented the defendants from offering evidence to show that the attachment was properly sued out. But this was not the case. The defendants did not offer any such evidence. They made no effort to contradict the *prima facie* case made by the plaintiff. In this respect this case is clearly distinguished from the case of Marshall v. Betner, 17 Ala. 832.—That was an action on the case, and not on the attachment bond; and the court only decided that the judgment in the attachment case did not estop the party from offering evidence to show that the attachment was properly sued out. That is very different from this case. Here no attempt was made to introduce such evidence.

4. The judgment was admissible in evidence even against a stranger, for the purpose of showing that such a judgment had been rendered. But these parties were not strangers to the at-

tachment suit. One of them was the very individual who procured the issuance of the attachment, and by giving this their bond in the case they made themselves privies to the case, and a judgment is not only admissible but conclusive evidence against parties and privies.

GOLDTHWAITE, J.—The condition of the attachment bond was, in accordance with the statute, (Clay's Digest 54 § 3,) to prosecute the attachment with effect, and pay the plaintiff all such damages as he might sustain by the wrongful suing out of the same; and although a record of a judgment or verdict, in favor of the defendant in attachment, would be conclusive to show that the plaintiff had failed to prosecute his suit to effect, by itself it was not conclusive, as to the wrongful suing out of the attachment; for it may have been rendered upon an issue not affecting the merits of the case. We do not say that it would have been conclusive had it been rendered upon the merits, (Lucas v. The Governor, 6 Ala. 826,) but it certainly was not when introduced by itself.—Marshall v. Betner, 17 Ala.

As to the argument for the defendant in error, that as the bill of exceptions does not show that any other evidence was offered than the judgment referred to, that the charge of the court must be taken with reference to that evidence only, and in that respect was correct: The fact that no other evidence was offered than the judgment, might render it more effective as evidence before the jury, but would not change its character, so as to authorize the court to say that it was conclusive. We cannot, however, say from the record that there was no other evidence, as the party excepting is only required to set out so much of the testimony as may be necesssary to show that the court erred in its ruling, and when this is done a reversal necessarily follows, unless the record also shows that no injury resulted from the error.

It is also urged, on the part of the appellee, that the assignment of errors cannot be considered, for the reason that it does not appear that the ruling of the court below was excepted to. We think that when the bill of exceptions shows that the ruling of the court was objected to at the time it was made on the trial, it is sufficient. A bill of exception is defined to be "a statement of the objections made by the parties to the ruling of the

court," (Bouv. Law Dic. 200,) and the bill in the present case comes fully up to the definition. We are unable to see any sound reason why it should be necessary to state specially that the ruling of the court was excepted to. Such must necessarily be the purpose and intent of every objection which is made to the decision of the court, and the objection becomes senseless and absurd on any other supposition.

The judgment must be reversed, and the cause remanded.

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ASSUMPSIT.

1. Assumpsit does not lie on an award when the submission to arbitration is under seal.—McCargo v. Crutcher, 575
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1. On a motion by a bankrupt to have his discharge entered of record, where the record does not purport to set out all the evidence, and the motion itself is wanting, the Appellate Court cannot presume that there was no proof before the court below that an execution had issued, nor that the motion did not allege such to be the fact; and the rule laid down in Brown v. Branch Bank, 20 Ala. 420, does not apply to the case.—Stewart & Fontaine v. Hargrove, 429
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1. Where a debtor conveys by deed all his property, both real and personal, to a trustee, in trust that he will, first, make the grantor a reasonable allowance for the comfortable support and maintenance of his family, and the education of his children; secondly, that he will pay all the grantor's debts, and the debts incurred in the execution of the trust; and, thirdly, that he will then convey the legal title to the property undisposed of to the grantor's children, and delivers the deed, as also the possession of the property, to the trustee, who accepts the trust, the trusts in favor of the grantor's creditors and children become perfect, and cannot afterwards be divested or revoked by any act of the grantor or trustee. And in such case, a court of equity will enforce the trust, at the instance of the grantor's children; and if the bill allege that the trustee has paid all the debts, the creditors are not necessary parties to the bill.—Andrews et al. v. Hobson's Adm'r et al., 219

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the statute, and in those lands of which the husband died seized; if the husband aliened in his life-time, and the purchaser has put valuable improvements on the lands, he may come into equity against his vendor's widow and heirs, to have the dower claim settled and deducted from the unpaid purchase money. 616

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6. Courts of equity grant relief against conveyances obtained by misrepresentation or mistake; and if the parties occupy a relation from which an unusual degree of confidence, affection or sense of duty naturally springs, the utmost degree of good faith is required from the party in whom the trust is reposed, and he must show that his contract is in every respect just, fair and equitable.—Boney et al. v. Hollingsworth et al., 690

7. A father executed a deed conveying certain lands to his sons, but filed it away among his papers, and never delivered it; after his death the grantees obtained a voluntary relinquishment from their sister of all her interest in the lands, by representing to her that their father on his death bed had declared it to be his intention that they should have them: The relinquishment was set aside in equity, because the grantees failed to show that they stated fully and fairly their father's dying declarations. 690

8. When a judgment is freely and voluntarily confessed, with full knowledge on the part of defendant of all the facts connected with it, and without any fraud or collusion on the part of plaintiff, the defendant is estopped from setting up any defence to the debt which existed anterior to such confession. and a court of equity cannot afford relief against it except upon some equity subsequently arising.—Moore et al. v. Barclay et al., 739

9. When a defendant in a judgment at law comes into equity for relief, alleging matters which would have constituted a good defence to the action at law, he must show by his bill that his failure to discover and avail himself of his defence at law was not attributable to any negligence or want of diligence on his part, but to fraud, accident or the act of the opposite party.—Taliaferro's Adm'r v. Branch Bank at Montgomery, 755

10. An allegation that complainant was ignorant of the facts on which he relies as a defence until long after the rendition of the judgment, is not sufficient. 755

11. On a motion to set aside the sheriff's return on an execution, it is competent for the defendant in execution to show that the money had been paid as the return showed, and had been tendered and refused, and by tendering it anew to avoid interest and any further issue of execution; and if he fails to do this, he cannot come into equity for relief, unless he explains the omission satisfactorily.—Minter and Gayle v. Br. Bank Mobile, 762

12. The removal of a trustee from the State, without having executed the trust confided to him, gives the Court of Chancery authority to execute it.—Cullum et al. v. Br. Bank Mobile, 797

CHANCERY PLEADING AND PRACTICE.

1. An interlocutory order of the Chancellor, directing "*that a receiver be appointed* to take possession" of the defendant's estate, "and that he and either of the parties have leave to apply to the court for any other or further directions, as to him may be necessary; *and that it be referred to the register, to appoint a fit and proper person to be the receiver aforesaid*, the person so to be appointed first giving bond," &c., and directing the defendant to deliver up to him his plantation, &c,, is a nullity, and the writ of prohibition should go from the Supreme Court to revoke it, and prevent proceedings under it. (*Per* Justices LIGON, GOLDTHWAITE and PHELAN.)

(CHILTON, C. J., and GIBBONS, J., *dissenting*, held that the order was only, at most, an erroneous construction of the statute; that the relator should have first applied to the Chancellor, by petition, for a correction or modification of the order; and that, as the Chancellor had jurisdiction of the case made by the bill, and a discretion as to the appointment of a receiver, and had erred merely in the manner of making the appointment, the writ should not be granted.)—Ex Parte Morgan Smith, 94

2. A bill should not be dismissed for the want of proper parties, unless the objection is taken in the court below; but if the objection is there taken, and complainant refuses to amend, his bill may be dismissed without prejudice.—Andrews et al. v. Hobson's Adm'r et al., 219

3. A cross bill which sets up matter not pertinent to that of the original bill, and seeks no relief against the complainant, is without equity, and should be dismissed. 219

4. A defendant, who is a formal party to a bill as husband of one of the heirs at law of an insolvent decedent, is a competent witness for his co-defendant, especially when he testifies against his own interest.—Burns v. Taylor et al., 255

5. The correctness of the rule questioned, which is laid down in Holman's Heirs v. Bank of Norfolk, 12 Ala. 405, that where a defendant who appears from the face of the proceedings to have no interest makes a long and formal answer, setting up as a defence to the bill matters which do not properly concern him, and thereby subjecting himself to a liability for costs, he is rendered incompetent as a witness for another defendant. 255

6. When an answer in chancery is used as evidence by the complainant, in an action at law subsequently instituted, the whole answer, so far as it is pertinent to the issue, must be taken together, whether its allegations are strictly responsive or set up affirmative matter in avoidance.—Crocker & Wife v. Clements' Adm'r, 296

7. When suit is brought to recover back money paid on a decree, which was afterwards reversed on error because the allegations and proof did not correspond, the defendant can derive no benefit from the master's report in the cause, although no exceptions were taken to it; the report falls to the ground with the decree. 296

8. In chancery cases, when the decree is voluntarily executed by the parties, and the complainant receives the money decreed to him, he may nevertheless prosecute an appeal.—Tarleton v. Goldthwaite's Heirs and Adm'r, 346

9. Memoranda from books, and written documents, when produced in response to a call in the bill, are evidence in the cause, but not necessarily conclusive evidence of the facts which they tend to establish. 346

10. Where the bill alleges an indebtedness on the part of the defendant's intestate to complainant, for rents received and not paid over or accounted for, and charges that defendant has in his possession the documents showing such indebtedness, and calls for their production; and the documents, when produced, tend to show that no indebtedness whatever existed, the complainant may nevertheless establish his claim by other evidence. 346

11. The nominal plaintiff in a judgment at law is not an indispensable party to a bill filed by the person for whose use it was recovered, to obtain satisfaction of it out of property in the hands of the debtor's legatees; the objection that he was a necessary party cannot be raised for the first time in the Appellate Court.—Sanders et al. v. Godley, 473

12. When a bill is filed by a creditor to subject to the satisfaction of the testator's debts certain property in the hands of his legatee, to whom it was bequeathed for life with remainder to her children, the remainder-men are necessary parties to the bill. 473

13. The service of subpœna on the surviving parent of infant defendants, *for them*, is sufficient, whether they are over or under fourteen years of age. 473

14. When judgment is recovered against an executor on a debt of the testator, and the creditor comes into equity to obtain satisfaction out of property in the hands of legatees, alleging the insolvency of the executor and his sureties at the time of the rendition of judgment and from that time until his death, the administrator of the executor is not a necessary party to the bill. 473

15. When a creditor comes into equity to obtain satisfaction of his debt out of property in the hands of his debtor's legatees, all the legatees who are made defendants must contribute their proportion to the satisfaction of the debt; a money decree against two of the defendants jointly, to one of whom slaves were bequeathed for life with remainder to her children, who are also defendants to the bill, is erroneous. 473

16. When a judgment debtor, or his assignee of the equity of redemption, files a bill to redeem lands sold under execution, he must allege in his bill the performance of all that the statute requires of him; if he fails to allege that possession was delivered to the purchaser without suit, his bill is without equity.—Paulling v. Meade, 505

17. When a judgment creditor files a bill to redeem, he must allege in his bill a tender of the amount of the purchaser's bid, together with ten per cent. thereon, and an offer to credit his judgment against the defendant with the further sum of ten per cent. on the amount of the bid. 505

18. An answer directly responsive to the bill must prevail against the testimony of one witness, however, full, clear and explicit, unless

supported by corroborating circumstances, which, when disconnected from the evidence of the witness, would tend to establish those charges which are denied by the answer, and would, of themselves, be evidence for that purpose —Beene's Heirs v. Randall's Heirs, 514

19. Although the allegations of a bill are sufficient to bring the case within the act of 1846 giving attachments in chancery, yet, if the complainant fails to comply with its requisitions as to making affidavit and giving bond, his bill cannot be sustained under that act.—McGown v. Sprague et al., 524

20. In determining the question of multifariousness the court can look to the bill only, and not to the answers or proof.—Halstead et al. v. Shepard, 558

21. A bill is not multifarious, which seeks to establish complainant's interest as a partner in certain notes payable to the partnership, which are alleged to have been fraudulently transferred by his copartner to the other defendants, by separate assignments made at different times. 558

22. The answer of one defendant cannot be used as evidence against his co-defendants in stating an account before the master; but if the other answers and proof in the cause show a greater balance against them than the account as stated on the basis furnished by the answer, it is error without injury. 558

23. Relief cannot be granted beyond the allegations of the bill, even when there is ample evidence to justify it.—Sandford v. Ochtalomi, 669

24. When a letter is annexed as an exhibit to a bill, and prayed to be taken as part of it, its statements, if not in any manner qualified, thereby become the statements of the bill.-Minter and Gayle v Branch Bank at Mobile, 762

25. When the record shows that the residence of a non-resident defendant is known, it must also show that a copy of the order of publication was sent to him by mail within forty days from the time it was made; and the omission of this will reverse the decree on error.—Cullum et al. v. Branch Bank at Mobile, 797

26. When a bill is filed to enforce a trust growing out of partnership transactions between complainants and defendant, or a joint trust in favor of complainants individually, and the evidence shows a separate trust in favor of one of the complainants only, the discrepancy between the *allegata* and *probata* is fatal.—Owens v. Collins & Langworthy, 837

27. When lands are purchased with partnership funds, and for partnership purposes, equity regards them as partnership property, and it is immaterial in whose name the purchase is made; but when the bill alleges both facts, while the proof shows a purchase by one partner for partnership purposes with his individual funds, the proof does not sustain the case made by the bill. 837

CHARGE OF COURT.

1. A charge which has the effect of withdrawing from the consideration of the jury any evidence which tends to establish the plaintiff's case or the defence, is erroneous.—Holmes v The State, 17

2. However correctly the judge may lay down the law in his general charge to the jury, yet if, in a subsequent specific charge, he places the case upon the existence of certain facts on which alone it may not be properly made to turn, the effect of which, if literally followed by the jury, is to withdraw from them the consideration of other facts which tend either to disprove or materially qualify those on which the charge is predicated, injury will be presumed from the error. 17
3. A charge which assumes a question of fact to be a question of law, is erroneous.—Newton v. Jackson, 335
4. When the evidence is conflicting on a question of fact material to the defence, the plaintiff is not entitled to a charge asserting his right to a recovery on the whole evidence.—Woolfork's Adm'r v. Sullivan, 548
5. When the entire evidence consists of the testimony of one witness, a charge that, if the jury believed the evidence, plaintiff could not recover, is equivalent to a demurrer to the evidence, and raises the same question.—Hollingsworth v. Martin, 591
6. In charging the jury, it is the duty of the court to confine itself to the testimony; the judge ought not to assume that any fact is proved, unless there is some testimony tending to prove it, and then it should be stated hypothetically. 591
7. A charge is erroneous, which assumes certain facts as proved, without referring to the jury the credibility of the testimony, and allowing them to determine whether those facts are proved or not.—Whitsett, Garner & Co. v Slater, 626
8. A charge is erroneous which refers it to the jury "to decide as to the sufficiency of the notice" to charge an endorser; it is the province of the jury to ascertain the facts, while the court determines their legal sufficiency to constitute notice.—Stanley v. Bank of Mobile, 652
9. When the evidence before the jury, in a *quasi* criminal proceeding for the violation of a city ordinance, is entirely circumstantial, the court may refuse to charge upon a portion of the testimony, and should refer the whole of it to the jury.—Brown v. Mayor &c. of Mobile, 722

COMMISSIONERS' COURT OF ROADS AND REVENUE.

1. An action on the case cannot be maintained by the Commissioners' Court of Butler County against the keeper of the poor-house, for debauching and getting with child one of the inmates of said poor-house.—Commmissioners' Court of Butler County v. McCann, 599

CONTRACT AND AGREEMENT.

1. When the contract of hiring is reduced to writing, and is general in its terms, not restricting the employment of the slave to any particular business, the hirer has the right to employ him in any business to which slaves are usually put, not involving extraordinary peril to his life or health, or to re-hire him to another to be so employed; and parol evidence is not admissible to show that the employment of the slave was to be restricted to a particular business.—Seay v. Marks, 532
2. If the hirer re-hires the slave to another, and he is killed while engaged in a hazardous business not covered by the contract, even by inevitable accident, the owner may regard such misuse of the slave as

a conversion, and recover his value from the first hirer, although the more immediate cause of his death was the slave's disobedience. 532

3. If a contract is usurious in its inception, no renewal of the note, or other change in the form of the contract, can alter its original character, but the taint of usury follows it even into the hands of a *bona fide* holder, unless he receives it through the fraud of the maker.—Pearson et al. v. Bailey, 537

4. When a written contract for the building of a house is subsequently varied by the parties, so as to require a greater amount of work and materials, as well as an alteration in the structure and a longer time for its completion, the workman is not bound to sue on the original contract, but may recover on a *quantum meruit*; and the written contract is admissible in evidence to show what the parties had agreed on as reasonable for that portion of the work embraced in it.—Hutchinson v. Cullum, 622

5. Plaintiff declared on a contract by which defendant promised to pay in consideration that plaintiff would cure a certain negro belonging to defendant, and offered in evidence a contract by which defendant promised to pay in consideration that plaintiff would take said negro "and effect a cure *free of any charge for board*:" *Held*, that the contract offered was not admissible evidence under the declaration, the consideration therein expressed being different from that alleged in the declaration.—Jordan v. Roney, 758

6. Plaintiff undertook to take charge of a certain negro belonging to defendant, "and effect a cure of the same free of any charge for board," and defendant promised, in consideration thereof, to pay a stipulated sum "six months from the time that the cure of said negro is effected, or from the date that he is returned and pronounced well; the intention and understanding of the parties being, that a sound and perfect cure is to be effected, for which the said J. (defendant) is willing to pay the above sum otherwise he is not to pay anything;" *Held*, that the legal effect of defendant's promise was, to pay the sum stipulated six months after a perfect cure had been effected, or six months from the time when the negro was returned perfectly cured; that plaintiff's declaration when he returned the negro, "that he was well," was admissible evidence for him, not as evidence of the fact that a cure had been effected, but to show that plaintiff had returned him as well, and thus fix the time when the six months would commence to run; and that evidence of the negro's condition more than six months after his return, was admissible to show that he was not perfectly cured when returned. 758

7. A stranger to a contract cannot enforce it by suit.—Foster v. Sykes et al., 796

8. The hirer of a slave is liable to a physician for medical services rendered him, independent of any contract to that effect with the owner. 796

9. A guaranty of a third person, given by plaintiff at request of defendant, is not a moral but a valuable consideration, especially when connected with an express promise of indemnity.—Carr's Executor v. Wyley, 821

10. The condition of a bond was as follows: "Whereas the said C. (obligee) guarantied for one J. W. W. on his bid for carrying the mail on route 3315, from Gainsville to Spring Place, in, through and by said W's (obligor's) influence and persuasion, which contract the said J. W. W. has refused to execute: Now, if said W. does and will stand between said C. and the General Post Office Department, so that said C. has no more trouble and expense, and releases said C. from all responsibility in said matter, then the above bond to be] void": *Held*, that the bond was not void for uncertainty, the condition being that the obligor would indemnify the obligee against his guaranty of the mail contractor which had been given at the obligor's request. 821

11. An action of debt lies on a bond conditioned that the obligor shall indemnify the obligee against his guaranty of a third person which had been given at the obligor's request. 821

12. A contract by an attorney to save his client harmless from all responsibility in a suit pending against him or to refund his fee, if valid, extends only to such liabilities as the law would recognize and enforce; and if the client suffers a judgment to be rendered against him in favor of another attorney whom he had never employed, for professional services in the same suit, he cannot resort to his contract of indemnity.—Lindsey v. Jones, 835

13. Plaintiff sued on a note under twenty dollars, which had been given for a clock sold by him to defendant and warranted to keep good time; the clock was shown to be worthless as a time-piece, but the case alone, without the works, was worth more than a nominal sum: *Held*, that defendant might have rescinded the contract, or might claim an abatement on the note to the amount of the damage which he had sustained; but having failed to rescind, and having kept the clock, judgment must go against him for what it was actually worth.—Davis v. Dickey, 848

COSTS

1. No costs can be adjudged against the State when it is plaintiff in a civil action and fails in its suit.—Governor v. Powell and Bradley, 579

2. When a cause is stricken from the docket of the Supreme Court for want of jurisdiction, no costs are recoverable.—Mazange v. Slocum & Henderson, 668

CRIMINAL LAW.

1. If one has reasonable apprehension of great personal violence, involving imminent peril to life or limb, he has the right to protect himself even at the expense of his assailant's life, if such protection cannot be otherwise secured.—Holmes v. The State, 17

2. A mere civil trespass upon a man's house, unaccompanied by such force as would make it a breach of the peace, is not a sufficient provocation to reduce the killing of the trespasser to manslaughter, if committed under circumstances from which the law would imply malice, as with a deadly weapon.—Carroll v. The State, 28

3. If the trespass is forcible, the owner may resist the entry, but he has no right to kill the assailant, unless it is rendered necessary to pre-

vent a felonious destruction of his property, or to defend himself against loss of life or great bodily harm; if he kills the assailant when there is not a reasonable ground for apprehending imminent danger to his person or property, it is manslaughter; and, if done with malice, express or implied, it is murder. 28

4. If the assault is made under circumstances which would create a just apprehension in the mind of a reasonable man of imminent danger to his person or property, the owner may lawfully act upon appearances, and kill the assailant; the law does not require that the danger should be real. 28

5. An entry into a man's house, after a warning not to enter, does not amount to a forcible trespass. 28

6. In general, threats of personal violence made by the deceased against the prisoner, and not communicated to him, can only be received in evidence when they constitute a part of the *res gestæ*. 28

7. The prisoner's confession cannot be rejected as evidence merely because the question to which it was a reply, assumed his guilt. 28

8. The officer who was conveying the prisoner to jail after his commitment, asked him "whether, if it was to do over again, he would do it;" to which the prisoner replied, "*Yes Sir-ree Bob:*" *Held*, that the question and answer were admissible evidence. 28

9. Evidence that, in making this reply, the prisoner's "manner was short," is also admissible for the State. 28

10. When an indictment containing four counts charges the defendant with playing cards "at a highway," "at a house where spirituous liquors were retailed," "at a public place," and "at a public house," while the evidence shows that the playing took place in a hollow more than one hundred yards from a house where spirituous liquors were retailed, and where the persons who were present at the playing had been drinking; that two persons first went to the hollow, and while they were playing the defendant and three others came; that they could not be seen from the grocery, nor from the road, which was a public one, nor could they see the road or grocery from the hollow; that witness had never, before or since, seen any playing at that place, and that there were no marks or signs of persons' having played there before, the evidence will not support a conviction under any of the counts in the indictment.—Smith v. The State, 39

11. Under an indictment for an assault with intent to murder, a special verdict finding the defendant "guilty of striking with a loaded whip calculated to produce death, without any cause or provocation," does not authorize the rendition of a judgment of "guilty in manner and form as charged in the indictment."—Scitz v. The State, 42

12. Evidence that the shoes taken from the feet of the horse ridden by the prisoner on the morning of the murder, "seemed to fit in every particular" the tracks found near the body of the deceased, is admissible against him.—Campbell v. The State, 44

13. When the evidence against the prisoner is entirely circumstantial, his conduct, his situation and locality, as affording him opportunities of knowing when the deceased left the school on the morning of the murder when she was last seen in life, and whether his being in that

place at that particular time was or was not an unusual occurrence with him, are circumstances which, though weak in themselves, are not so foreign from the main inquiry as to justify their exclusion from the jury as irrelevant. 44

14. On the trial of a prisoner indicted for murder, the evidence against him being circumstantial, it was shown that, on the second morning after the murder, he was seen coming from the direction of a house where two women, mother and daughter, resided, the daughter being an unmarried woman who had two children; that he had frequently been seen there before, at one time shaving and changing his clothes; that, on the evening of the same day, witness went to the house, and found the daughter alone, washing a man's shirt, which had splotches or stains on the bosom and cuff of the right sleeve; that "said splotches looked more like the stains from chesnut timber than anything else witness could compare them to;" that no man lived in the house, and witness knew no man in that neighborhood who wore so fine a shirt. The witness was asked, whether any person inquired of him if he knew what would take stains out of shirts; to which he replied, that the question was asked him by the young woman, and gave his answer to it. The prisoner objected both to the question and answer, and also moved to exclude from the jury all that the witness had said about the shirt and the stains on it, but the court refused to do so. The young woman was afterwards introduced as a witness for the defence, and testified, on cross-examination, that the prisoner stayed at their house on the second night after the murder, that he left a shirt with her to be washed, and that she washed it. *Held*, that the evidence objected to by the prisoner was properly admitted. 44

15. The prisoner's confession that he had assisted to get another man's son out of jail, who would aid him in escaping, and the fact that this man had come twice to the jail where the prisoner was confined, are admissible evidence against him. 44

16. The declarations of the prisoner cannot be given in evidence in his favor, even for the avowed purpose of bringing out the reply of the witness to whom they were made, unless they constitute a part of a conversation drawn out in evidence by the State. 44

17. After the State has proved the appearance of the prisoner on the evening of the day of the murder and on the following day, the prisoner cannot be allowed to prove that, on the third day thereafter, when informed of the murder, he appeared surprised; nor can he be allowed to prove that he seemed astonished, when informed that he was suspected of the murder. 44

18. A letter written for the prisoner by the witness, while they were in jail together, is not admissible evidence for the prisoner, either as original testimony of its contents, or for the purpose of impeaching the witness. 44

19. Any evidence giving a history of the prisoner's acts on the day of the murder, is relevant, and admissible against him. 44

20. The prisoner's witnesses may be questioned, on cross-examination, as to their relations with the prisoner,—whether they were on terms of friendly intimacy—their means of knowing the facts to which they testify, and as to any bias or prejudices which might influence them. 44

21. The county surveyor, a witness for the prisoner, illustrated his evidence with a diagram which he had himself made, showing the relative situation and distances from each other of several places near the scene of the murder. The diagram was introduced without objection from the State, and the witness was cross-examined on it: *Held*, that it was discretionary with the court to allow the jury to take it with them on their retirement, and its exclusion from them was not revisable on error. 44

22. A witness for the State, who, on cross-examination, testifies that he has taken an active part in the prosecution, and that he cherishes unfriendly feelings towards the prisoner, may be asked, on re-examination, "whether his feelings towards the prisoner are such as to desire to see an innocent man convicted." 44

23. When a white man is indicted for an assault on a slave with intent to murder him, and, without demurring to the indictment or moving to quash it, goes to trial on a plea of not guilty, he may be convicted of assault and battery only; and he cannot afterwards, by assigning for error the verdict of the jury, raise the question whether an indictment lies against a white man for an assault on a slave with intent to murder.—Carpenter v. The State, 84

24. Proceedings for the recovery of fines or penalties for the violation of city ordinances, are *quasi* criminal in their character, and should be conducted according to the rules applicable to indictments for misdemeanors.—Brown v. Mayor &c. of Mobile, 722

25. When defendant is charged with the violation of a city ordinance forbidding the trading with slaves without the permission of the owner or employer, and the statement does not aver the name of the slave or of his owner or employer, it is fatally defective on demurrer. 722

26. When the evidence before the jury, in a *quasi* criminal proceeding for the violation of a city ordinance, is entirely circumstantial, the court may refuse to charge upon a portion of the testimony, and should refer the whole of it to the jury.

CUSTOM.

1. When it is shown or may be fairly presumed that the parties to a policy contracted in reference to a custom existing in the city where they did business, and where the policy was effected, the general law must give way to the custom.—Fulton Ins. Co. v. Milner, Tinsley & Company, 420

2. To give validity to a custom regulating the assessment of damages in cases of partial loss on insured goods, it is not necessary that it should extend to the whole State; if the custom is generally known and acted on in the port, city or town where the policy is effected, it is sufficient. 420

3. The custom in the city of Mobile as to the mode of adjusting damages in cases of partial loss on valued policies, held valid and binding on parties residing and contracting in that city. This custom is, to pay the difference between the sales price of the injured article and the price stipulated in the policy. 420

DAMAGES.

1. In debt on bond conditioned to indemnify the obligee for all costs and damages he might wrongfully sustain by the suing out of a writ of seizure from the Chancery Court, the death of one of the slaves seized under the writ before the time of trial, does not affect the defendant's liability for hire.—Zeigler & Hall v. David, 127
2. In such case, plaintiff may recover the damage actually sustained, without proof of malice in suing out the process. 127
3. The transcript of the record of the chancery suit showing the dismissal of the bill for want of prosecution, is *prima facie* evidence that the writ of seizure was wrongfully obtained. 127
4. And if the possession of the slaves is not restored to the plaintiff, he is entitled to recover their hire down to the time of trial, although, after the dismissal of the first bill for want of prosecution, a second was filed for the same purposes, and a new bond given, conditioned for the forthcoming of the slaves to abide the final order and decree of the court. 127
5. A bailment terminates when the objects for which it was made are accomplished, and it then devolves on the bailee to return the property; and if he fails to do so, he is liable for damages in detinue without a special demand.—Lay's Ex'r v. Lawson's Adm'r, 377

DEEDS AND CONVEYANCES.

1. The deed of husband and wife leasing the wife's interest in land, unless acknoweledged by her on private examination pursuant to the statute, (Clay's Digest § 27,) is absolutely void as to her, and incapable of confirmation, except by acts amounting to a re-delivery.—George et al. v. Goldsby, 326
2. A married woman cannot dispose of her interest in real estate, except in the manner prescribed by the statute.—(Clay's Digest 155 § 26.)—Beene's Heirs v. Randall's Heirs, 514
3. When a deed is made to two jointly, the law, in the absence of proof as to their respective interests, presumes that they are equally interested; and the transfer by one of them, by words *in præsenti*, of all his right, title and interest in the lands, conveys a moiety.—Long v. McDougald's Adm'r, 413
4. A tender by the vendor of a deed signed by himself and wife, and attested by two witnesses, is sufficient; it is the duty of the vendee to have it probated if he wishes it.—Carter v. Corley, use &c., 612
5. The deed of husband and wife, acknowledged by them before a justice of the peace, is a full compliance with the law, so far as the husband is concerned, and may be admitted to record, without any proof of execution by a subscribing witness.—Harvey v. Doe ex dem. Carlisle, 635
6. The strictness of the ancient rule as to repugnancy in deeds is now much relaxed; the intention is to be gathered from the whole instrument, rather than from particular clauses seemingly repugnant.—McWilliams et al. v. Ramsay, adm'r, 813

DETINUE.

1. A bailment terminates when the objects for which it was made are accomplished, and it then devolves on the bailee to return the property, and if he fails to do so, he is liable for damages in detinue without a special demand.—Lay's Ex'r v. Lawson's Adm'r, 377
2. In detinue for a slave, a plea alleging the slave's death since the last continuance is bad on demurrer. 377
3. Adverse possession for the time prescribed as a bar by the statute of limitations, may be given in evidence under the plea of the general issue in detinue. 377

DIVORCE.

1. When a husband abandons his wife without just cause, on account of a difficulty occurring between them respecting her property, and soon afterwards proposes a reconciliation through the medium of a third person, which the wife refuses, declaring that "she had made up her mind not to live with him any longer," her declaration is evidence that she consented to the separation, and she cannot afterwards obtain a divorce on account of the abandonment.—Crow v. Crow, 583
2. A bill for a divorce on the ground of adultery must allege the name of the person with whom the adultery was committed, or the fact that it is unknown to complainant; but if the defendant answers the bill, without raising any objection on account of the want of such an allegation, he will be held to have waived it.—Holston v. Holston. 777
3. A divorce *a vinculo matrimonii* was granted to the wife, on the ground of abandonment and adultery on the part of her husband, when the evidence showed that she had separated from him before the consummation of their nuptials, because she had just reasons to apprehend that he had another wife then living; that he consented to the separation at the time, and promised to produce sufficient evidence to remove her suspicions; that he entirely failed to produce such evidence, and showed no exertions to obtain it; and that he led a vagabond, roaming life, and committed adultery with different women, with one of whom he lived four months. 777
4. The statute which allows a bill for divorce to be filed in the chancery court of the county in which the complainant resides, is remedial and cumulative, and does not take away the right to file it in the county of the defendant's residence.—Reese v. Reese, 785
5. Every act of cruelty complained of need not be alleged in the bill with circumstantial particularity; one or two specifications will be sufficient, and the evidence may make out others under the general charge. 785
6. Where the wife continues to live with her husband for two years after the commission on his part of an act of gross violence, this will not amount to condonation, nor estop her from afterwards complaining of it. 785

DOWER.

1. The act of 1839 authorizing relinquishments of dower by deed of husband and wife, attested by two witnesses, (Clay's Digest 174 § 10,) embraces *femes covert* who reside out of the State as well as residents. —Carter v. Corley, use &c, 612

2. An outstanding right of dower, whether perfect or inchoate, is an incumbrance upon a title which renders it defective; and a vendee who has contracted for "good and lawful titles," may come into equity to have compensation for such dower claim out of the unpaid purchase money.—Thrasher and Mitchell v. Pinckard's Heirs and Adm'rs, 616
3. The court of probate can only allot dower in the mode prescribed by the statute, and in those lands of which the husband died seized; if the husband aliened in his life-time, and the purchaser has put valuable improvements on the lands, he may come into equity against his vendor's widow and heirs, to have the dower claim settled and deducted from the unpaid purchase money. 616
4. If an administrator rents the plantation on which his intestate resided at the time of his death, when the widow's dower has not been assigned to her, the heirs at law cannot maintain an action against him for the rents.—McLaughlin et al. v. Godwin, 846

EJECTMENT.

1. In ejectment, at common law, the death of the lessor of the plaintiff did not abate the suit, but it might be continued in the name of the nominal plaintiff, for the recovery of the land and nominal damages; and where the action for mesne profits was commenced in the name of the nominal plaintiff, as it might be, the suit would be unaffected by the death of any party in interest on the part of the plaintiff.—Ex parte Swan, 192
2. But by our statute, (Clay's Digest 320 § 46,) a judgment for damages can only be rendered in favor of the real plaintiff, and if he dies pending the suit, a judgment for damages in favor of the nominal plaintiff is void. 192
3. In ejectment in this State, where damages are sought as well as the land, if the lessor of the plaintiff dies pending the suit, it must be revived in the names of his heirs at law and personal representative. 192
4. In ejectment, where separate demises are laid from several tenants in common or co-parceners, if the statute of limitations has effected a bar against one of the lessors, a recovery may be had on the demises from the others —Rawls v. Doe ex dem. Kennedy, 240
5. When the defendant in an action of ejectment dies, pending the suit, it should be revived in the names of his heirs at law and personal representatives.—Crutchfield v. Hudson, 393
6. A deed from a Creek Indian reservee, under the treaty of March 24, 1832, after it has been approved by the President of the United States, conveys such title to the purchaser as will maintain an action of ejectment.—Long v. McDougald's Adm'r. 413
7. The administrator of an estate which has been declared insolvent has no right, under the statute, to bring ejectment for the recovery of lands belonging to the decedent. 413
8. A deed of lands held adversely to the grantor is good as between the parties on the principle of estoppel, which can only operate on the parties and their privies; but the grantor may nevertheless maintain ejectment against the adverse holder.—Harvey v. Doe ex dem. Carlisle et al., 635

ERRORS AND APPEALS.

1. The county surveyor, a witness for the prisoner, illustrated his evidence with a diagram which he had himself made, showing the relative situation and distances from each other of several places near the scene of the murder. The diagram was introduced without objection from the State, and the witness was cross-examined on it: *Held*, that it was discretionary with the court to allow the jury to take it with them on their retirement, and its exclusion from them was not revisable on error.—Campbell v. The State, 44
2. In chancery cases, when the decree is voluntarily executed by the parties, and the complainant receives the money decreed to him, he may nevertheless prosecute an appeal.—Tarleton v. Goldthwaite's Heirs and Adm'r, 346
3. An error in favor of the appellant forms no ground of reversal.—McGonegal v. Walker, 361
4. An assignment of error which is not insisted on in the argument or brief of the appellant's counsel, must be considered as waived.—Fulton Ins. Co. v. Milner, Tinsley & Co., 420
5. When one of the heirs at law appears and contests the validity of the will, he cannot be heard to assign for error that there were other resident heirs who were not duly notified and who did not appear.—Walker v. Jones, 448
6. Where the parties in interest appear, and consent to the postponement of the settlement, they cannot afterwards be heard to complain of any irregularity in the manner of bringing them in.—Barnett's Ex'r v. Tarrence, 463
7. A writ of error does not lie from the refusal of a probate judge to proceed with the settlement of the accounts of an administrator of an insolvent estate, to which he had been cited by a creditor, and his dismissal of the citation; if the judge improperly dismisses the citation and refuses to proceed, *mandamus* lies to compel his action.—Shadden v. Sterling's Adm'rs, 518
8. The action of the Probate Court under the act of February 11, 1850, (Pamphlet Acts 27,) upon questions of fact growing out of administrations, is a matter of law, and is revisable in the Appellate Court in the same manner as the decisions of the court on questions of fact which are referred to the court rather than to the jury; in such cases the Appellate Court will look to the whole evidence, if it is to be found in the record, and will not send the case back for another trial, if enough remains to sustain the judgment, rejecting testimony which may have been illegally admitted.—Bogle et al. v. Bogle's Adm'r, 544
9. The answer of one defendant cannot be used as evidence against his co-defendants in stating an account before the master; but if the other answers and proof in the cause show a greater balance against them than the account as stated on the basis furnished by the answer, it is error without injury.—Halstead et al. v. Shepard, 558
10. A decision of the Supreme Court is conclusive of the law of the case in which it is made, and its correctness will not be inquired into when the case is brought up again.—Price et al. v. Price's Adm'r, 608
11. In appeal cases from justices of the peace, where judgment is ren-

dered as on issue joined, it is not error to allow the substitution of a lost statement without notice to the defendant.—Ortez v. Jewett & Co., 662

12. When a partnership is plaintiff, and the christian names of the partners are nowhere set out in the summons or delaration, if defendant neither pleads in abatement, nor demurs, but goes to trial on a plea to the action, he will be held to have waived the defect, and cannot assign it for error. 662

13. Injury will be presumed from error, unless the record itself rebuts the presumption, and shows affirmatively that no injury could have resulted.—Mims v. Sturdevant and Wife, 664

14. When incompetent evidence is admitted, when objected to, on the trial of an issue before the Court of Probate, the decision of the court may be revised on error, although the issue was tried without the intervention of a jury. 664

15. Actions and proceedings commenced before the Code took effect are governed by the old law as to all continuous proceedings had in the court in which they are pending; but proceedings in the nature of a new action, although predicated upon the determination of the court had under the old law, if commenced after the Code went into operation, must conform to its provisions.—Mazange v. Slocum & Henderson, 668

16. Section 3016 of the Code, abolishing writs of error, and giving an appeal in lieu thereof, applies alike to judgments rendered before and since the 17th January, 1853, the day on which the Code went into operation. 668

17. A point which was not presented in the court below in any shape, cannot be noticed in the Appellate Court.—McGinty v. Mabry, 672

18. The fact that a writ is addressed "to any lawful officer" of a specified county, instead of "any sheriff of the State of Alabama," is matter of abatement only, and not available on error.—Yonge v. Broxson, 684

19. When two conflicting opinions are delivered in the same case at different times, and it is brought up a third time on error or appeal, neither one of the previous decisions is conclusive, but the case must be considered as if presented for the first time.—Moore et al. v. Barclay et al., 739

20. When a defendant, against whom a judgment is rendered by a justice of the peace, removes the case by appeal to the Circuit Court, he is regarded as the actor in the subsequent proceedings, and is held to be constantly in court.—Martin v. Higgins, 775

21. The notice to the appellee, required in appeal cases from justices of the peace, is intended solely for the benefit of the appellee, and the appellant cannot complain on error that it was not given. 775

22. The action of the inferior courts on motions for new trials, is not revisable on error. 775

23. When a cause is brought a second time before the Supreme Court, that court will will not question the correctness of the law as declared by the previous decision.—Weaver's Ex'rs v. Weaver's Creditors, . 788

ESTATES OF DECEASED PERSONS.

1. Where the record shows an irregular final settlement of an estate, the court will presume in favor of its correctness, after the lapse of twenty years, that the necessary notices were given, and that the parties in interest were present.—Barnett's Ex'r v. Tarrence, 463
2. Where the parties in interest appear, and consent to the postponement of the settlement, they cannot afterwards be heard to complain of any irregularity in the manner of bringing them in. 463
3. Where the slaves returned in the executor's inventory as belonging to the estate are divided by commissioners, under an order of the Orphans' Court, among the distributees, and after the lapse of twenty years one of the distributees attempts to charge the executor with the value of other slaves not included in the inventory, and shows no excuse for his delay, his claim cannot be asserted or allowed in the Orphans' Court. 463
4. When land is sold under an order of the Orphans' Court for the payment of the debts of the estate, and a surplus remains after paying all the debts, it goes to the heirs as the land itself would have gone.—Williamson & Wife v. Mason, 488
5. The title to personal property descends to the personal representative, and the parties beneficially interested take as distributees under the statute.—Randall and Randall v. Lang, 751
6. The Orphans' Court having granted an order of sale of "all the *perishable* property" belonging to an estate, the administrator proceeded under it to sell all the *personal* property, including the negroes, and made due return of the sale to the court, which was received and ordered to be recorded; and the administrator *de bonis non* afterwards brought detinue for one of the negroes sold: *Held*, that in the absence of a statutory definition of the term "*perishable* property," as applied to the estates of decedents, the order should receive the same interpretation given to it by the court that made it and the parties acting under it, and that the sale passed the legal title to the slaves.—Steele v. Wyatt's Adm'r, 764
7. If an administrator rents the plantation on which his intestate resided at the time of his death, when the widow's dower has not been assigned to her, the heirs at law cannot maintain an action against him for the rents.—McLaughlin et al. v. Godwin, 846

ESTOPPEL.

1. Where a father by deed creates a voluntary trust in favor of his children, who are minors, and delivers the deed and the property conveyed by it to the trustee, who accepts the trust, the grantor's ratification of a purchase by the trustee at his own sale does not conclude the beneficiaries.—Andrews et al. v. Hobson's Adm'r et al., 219
2. If a person in possession of land, upon inquiry by one who is about to purchase it from another, relative to the title, advises him to purchase, and assures him that there will be no difficulty about the title if he does, and afterwards delivers up the possession to the purchaser's agent, his acts amount to an abandonment or waiver of a vendor's

lien which he held against the person from whom the purchaser bought.—Burns v. Taylor et al., 255

3. Where a deed of trust, conveying both real and personal property, is found fraudulent and void because made to hinder and delay the grantor's creditors, in a claim suit under the statute between a judgment creditor of the grantor and a purchase under the deed, the claimant is not concluded by that verdict and judgment, as to the *bona fides* of the deed, in a suit subsequently brought against him by a purchaser at sheriff's sale under the same judgment, to recover the lands conveyed by the deed, which defendant bought at the trustee's sale under the deed; and the record of the former suit is not admissible evidence against the defendant in the latter case.—Crutchfield v. Hudson, 393

4. A creditor who receives his *pro rata* share of the proceeds of sale under a deed of trust, is not thereby estopped from attacking the deed for fraud. 393

5. When a special term of the court is appointed by consent for the trial of an issue *devisavit vel non*, the contestant is estopped from raising the objection that the court could not hear and render judgment in the cause at any other than a regular term.—Walker v. Jones, 448

6. A deed of lands held adversely to the grantor is good as between the parties on the principle of estoppel, which can only operate on the parties and their privies; but the grantor may nevertheless maintain ejectment against the adverse holder.—Harvey v. Doe ex dem. Carlisle et al., 635

7. When two joint makers of a note are garnisheed as the debtors of the payee, and answer admitting their indebtedness, if neither of them discloses the fact that they have been notified of the transfer of the note, a payment of the judgment rendered against them on their answer will not discharge them from liability to the real owner; but if one discloses this fact in his answer, and the transferree is thereupon notified, and fails to appear and assert his rights, he is estopped from setting up any claim against the garnishees.—Smoot & Ketchum v. Eslava, 659

8. When a judgment is freely and voluntarily confessed, with full knowledge on the part of defendant of all the facts connected with it, and without any fraud or collusion on the part of plaintiff, the defendant is estopped from setting up any defence to the debt which existed anterior to such confession, and a court of equity cannot afford relief against it except upon some equity subsequently arising.—Moore et al. v. Barclay et al., 739

EVIDENCE.

1. In general, threats of personal violence made by the deceased against the prisoner, and not communicated to him, can only be received in evidence when they constitute a part of the *res gestæ*.—Carroll v. The State, 28

2. The prisoner's confession cannot be rejected as evidence merely because the question to which it was a reply, assumed his guilt. 28

3. The officer who was conveying the prisoner to jail after his commitment, asked him "whether, if it was to do over again, he would do it;"

to which the prisoner replied, "*Yes Sir-ree Bob:*" *Held*, that the question and answer were admissible evidence. 28

4. Evidence that, in making this reply, the prisoner's "manner was short," is also admissible for the State. 28

5. A witness may be asked, and may state, his "opinion as to the time of day" when an event occurred.—Campbell v. The State, 44

6. So, also, he may state his opinion as to the length of time which elapsed between the happening of two events. 44

7. Evidence that the shoes taken from the feet of the horse ridden by the prisoner on the morning of the murder, "seemed to fit in every particular" the tracks found near the body of the deceased, is admissible against him. 44

8. When the evidence against the prisoner is entirely circumstantial, his conduct, his situation and locality, as affording him opportunities of knowing when the deceased left the school on the morning of the murder when she was last seen in life, and whether his being in that place at that particular time was or was not an unusual occurrence with him, are all circumstances which, though weak in themselves, are not so foreign from the main inquiry as to justify their exclusion from the jury as irrelevant. 44

9. On the trial of a prisoner indicted for murder, the evidence against him being circumstantial, it was shown that, on the second morning after the murder, he was seen coming from the direction of a house where two women, mother and daughter, resided, the daughter being an unmarried woman who had two children; that he had frequently been seen there before, at one time shaving and changing his clothes; that, on the evening of the same day, witness went to the house, and found the daughter alone, washing a man's shirt, which had splotches or stains on the bosom and cuff of the right sleeve; that "said splotches looked more like the stains from chesnut timber than anything else witness could compare them to;" that no man lived in the house, and witness knew no man in that neighborhood who wore so fine a shirt. The witness was asked, whether any person inquired of him if he knew what would take stains out of shirts; to which he replied, that the question was asked him by the young woman, and gave his answer to it. The prisoner objected both to the question and answer, and also moved to exclude from the jury all that the witness had said about the shirt and the stains on it, but the court refused to do so. The young woman was afterwards introduced as a witness for the defence, and testified, on cross-examination, that the prisoner stayed at their house on the second night after the murder, that he left a shirt with her to be washed, and that she washed it. *Held*, that the evidence objected to by the prisoner was properly admitted. 44

10. A conviction for libel in another State does not disqualify a witness in this State; nor is the record of conviction admissible in evidence to discredit him. 44

11. It is no objection either to the competency or credibility of a witness, that he is subject to fits of mental derangement, if it appears that he is sane at the time he is offered. 44

12. When the competency of a witness is attacked on the ground of in-

sanity, and the court decides in favor of his sanity, the evidence adduced to the court cannot be submitted to the jury to affect his credibility. 44

13. When evidence is adduced to the court on a preliminary examination touching the incompetency of a witness by reason of insanity, the Appellate Court will presume that the judge was not influenced by any evidence which he ought not to have considered. 44

14. The prisoner's confession that he had assisted to get another man's son out of jail, who would aid him in escaping, and the fact that this man had come twice to the jail where the prisoner was confined, are admissible evidence against him. 44

15. The declarations of the prisoner cannot be given in evidence in his favor, even for the avowed purpose of bringing out the reply of the witness to whom they were made, unless they constitute a part of a conversation drawn out in evidence by the State. 44

16. When a witness has been cross-examined respecting his former statements, with a view of impeaching him, he may be asked on re-examination in chief his motive in making those statements. 44

17. A party may ask his own witness whether he has not previously made statements inconsistent with what he has just stated on the trial. 44

18. A witness may be questioned, on cross-examination, as to his habits of drinking. 44

19. After the State has proved the appearance of the prisoner on the evening of the day of the murder and on the following day, the prisoner cannot be allowed to prove that, on the third day thereafter, when informed of the murder, he appeared surprised; nor can he be allowed to prove that he seemed astonished, when informed that he was suspected of the murder. 44

20. When a witness is introduced for the purpose of impeaching another by proof of his general character, and, on cross-examination, testifies, that public rumor imputed to the impeached witness "a bad moral character as to drinking, fighting, shooting at men, and certain publications, reputed false, in his newspaper," he cannot be asked on re-examination in chief, 'what other moral delinquencies public rumor attributed to him;' nor, 'what rumor said in regard to those publications;' nor, 'whether he did not know of his own knowledge, that they were false.' 44

21. The general character of a witness at his place of residence, cannot be proved by evidence of what rumor said of it before he came to that place. 44

22. Evidence that several indictment for libel are pending against a witness, is not admissible for the purpose of impeaching him. 44

23. A letter written for the prisoner by the witness, while they were in jail together, is not admissible evidence for the prisoner, either as original testimony of its contents, or for the purpose of impeaching the witness. 44

24. Any evidence giving a history of the prisoner's acts on the day of the murder, is relevant, and admissible against him. 44

25. The prisoner's witnesses may be questioned, on cross-examination, as to their relations with the prisoner,—whether they were on terms of

friendly intimacy—their means of knowing the facts to which they testify, and as to any bias or prejudices which might influence them. 44

26. An unmarried woman may be asked, on cross-examination, altho' she might refuse to answer, whether or not she has any children. 44

27. The county surveyor, a witness for the prisoner, illustrated his evidence with a diagram which he had himself made, showing the relative situation and distances from each other of several places near the scene of the murder. The diagram was introduced without objection from the State, and the witness was cross-examined on it: *Held*, that it was discretionary with the court to allow the jury to take it with them on their retirement, and its exclusion from them was not revisable on error. 44

28. A witness for the State, who, on cross-examination, testifies that he has taken an active part in the prosecution, and that he cherishes unfriendly feelings towards the prisoner, may be asked, on re-examination, "whether his feelings towards the prisoner are such as to desire to see an innocent man convicted." 44

29. The individual opinion of a witness, founded on rumor respecting the guilt of another witness of the crime of murder, is not admissible for the purpose of impeaching the latter. 44

30. When plaintiff's slaves are taken under a writ of seizure, issued out of chancery on a bill for divorce filed against him by his wife, and, the bill being dismissed for want of prosecution, plaintiff brings suit on the indemnity bond to recover damages, the record of a second suit commenced by the wife for the same purposes as the first, and still pending, is relevant and admissible evidence for the defendants in the suit on the bond, if it is shown that the slaves seized in the first suit, after the institution of the second, were in the custody of the law, or of one of the suitors in the Chancery Court by its order; but when the bill of exceptions does not set out the record of the second suit, and only recites that, on the filing of the second bill, an order was granted, commanding the register to issue a writ according to the prayer of the bill, on complainant's entering into bond "conditioned to have said slaves forthcoming to abide the final order and decree of the court," and that the bond was taken, pursuant to the order, conditioned to pay plaintiff "all such costs and damages as he might sustain by the wrongful suing out of the injunction and process," the Appellate Court cannot infer that a writ of seizure was issued in the second suit, and the record is therefore irrelevant and inadmissible.—Zeigler & Hall v. David, 127

31. When a sheriff is ruled for failing to make money on an execution, which he had levied on certain negroes as the property of the defendant, he may rebut the *prima facie* liability which his return raises against him, by showing that the negroes were taken from his possession under a writ of *habeas corpus*, and were discharged as free persons; and the writ of *habeas corpus* and proceedings thereon are admissible evidence for that purpose.—Union Bank of Tennessee v. Benham, 143

32. When negroes which are not at the time held as slaves, are levied on and discharged, the sheriff, when ruled, may repel the presumption arising from the levy, by showing that they were free. 143

33. In a suit for freedom under the statute of this State, the trial being had on one issue as to all the petitioners, evidence of what a deceased witness testified on a former proceeding under the act of Congress of 1793, to which only a portion of the petitioners were parties, is not admissible.—Fields v. Walker et al., 155

34. In detinue by an administrator *de bonis non* against a purchaser from the widow, who was named executrix in the will, for the recovery of a slave bequeathed to her for life, her legal appointment and qualification as executrix may be presumed after the lapse of twenty years, without the production of the record, from the existence and production of the will and its probate, an inventory and appraisement of the estate purporting on its face to be made under the authority and sanction of the court, and proof that the executrix acted as such from the testator's death until her own, paid the debts of the estate, kept the property together as directed by the will, and exercised ownership and control over it; that the heirs and legatees acquiesced in her acts and deeds in reference to the property for more than twenty years, and that the records of the Court of Probate of the county in which the will was probated were loosely kept for a series of years about that time.—Gantt's Adm'r v. Phillips, 275

35. And in such case, the inventory and appraisement, and evidence of the acts and declarations of the executrix, legatees and distributees, are admissible, as laying the predicate for the court to leave to the jury the question of the legal appointment and qualification of the executrix. 275

36. Where a decree is reversed on error after the money has been collected under it, and the suit is subsequently dismissed for want of prosecution in the court below, the defendant in the decree is *prima facie* entitled to recover back the money, and the burden of proving an equitable right to retain it is cast on the plaintiff.—Crocker & Wife v. Clements' Adm'r, 296

37. When an answer in chancery is used as evidence by the complainant, in an action at law subsequently instituted, the whole answer, so far as it is pertinent to the issue, must be taken together, whether its allegations are strictly responsive or set up affirmative matter in avoidance, 296

38. When the consideration of a note is not expressed in the instrument itself, parol proof is admissible to show what it was, and that the contract of which the note formed a part had been rescinded by the parties.—Newton v. Jackson, 335

39. A general objection to an answer containing competent as well as incompetent evidence, may be overruled. 335

40. When evidence is adduced to contradict the statement of a witness on an immaterial point, the party who called him may introduce witnesses to sustain his general character, although the opposite party disclaims any intention of discrediting him. 335

41. A motion to exclude testimony should be clear and specific; if it is so general and indefinite that the mind is at a loss readily to understand the ground which it is intended to cover, the motion should be overruled. 335

42. Memoranda from books, and written documents, when produced in response to a call in the bill, are evidence in the cause, but not necessarily conclusive evidence of the facts which they tend to establish.—Farleton v. Goldthwaite's Heirs and Adm'r, 346

43. When the complainant seeks an account of rents received by the defendant, his co-tenant, and not paid over or accounted for, and proves the contracts of rent made by him, fixing the amounts, &c., this is sufficient, *prima facie*, to charge the defendant with the entire amount, and to throw on him the *onus* of showing what he did not receive. 346

44. On the trial of a claim suit under the statute, the record of the plaintiff's judgment against the defendant in execution, is irrelevant and inadmissible.—Taliaferro v. Lane, 369

45. In an action against the owners of a steamboat to recover damages for the loss of a stage, occasioned by a collision between the steamboat and a ferry flat on board of which the stage was, evidence that the ferryman of the flat was expert and careful is irrelevant to the issue, and therefore inadmissible for the plaintiff.—Otis & Jayne v. Thom, 469

46. In such action, the statement of a witness who saw the collision, "that he thought, had the steamboat returned to the assistance of the flat when the call for assistance was made, the stage could have been saved," is mere matter of opinion, and therefore inadmissible. 469

47. A witness who saw the collision testified that, after the steamboat struck the flat, she stopped her engine, and when about fifty yards from the flat she was called upon by those on board of the latter to come to their assistance; whereupon, some one on board the steamboat was heard to say, in a loud and commanding tone, "Go ahead, and let her sink; it's nothing but a damned flat-boat, any how," and the steamboat then went on without rendering any assistance to the flat: *Held*, that the words stated as being used on board of the boat were admissible evidence for plaintiff. 469

48. An administrator may discharge himself by showing that he delivered to his successor the assets of the estate which remained in his hands unadministered, and the admissions of the latter are competent evidence to prove that fact.—Bogle et al. v. Bogle's Adm'r, 544

49. A general objection to evidence of which a part is legal may be overruled.—Smoot and Ketchum v. Eslava, 659

50. In a contest between garnishees, who have paid a judgment rendered against them, and one claiming by a transfer from the debtor, of which they were notified before they answered, evidence that they paid the money to the clerk in court, who immediately paid it back to one of them as the attorney of the plaintiffs in the judgment, is irrelevant. 659

51. The testimony of a witness on a point not in issue cannot be contradicted, nor can he be questioned about a matter not relevant to the issue in order to lay a ground for impeaching him.—Ortez v. Jewett & Co., 662

52. The declarations of one who is in possession of personal property, explanatory of his possession, are admissible evidence; but his declarations in regard to the contract by which he came into possession,

are not admissible evidence in his favor.—Mims v. Sturdevant and Wife, 664

53. The motion docket is a book of the court required by law to be kept by the clerk, and the entries in it may be looked to as showing the orders taken by the court, and are sufficient evidence to authorize the rendition of judgment *nunc pro tunc*.—Yonge v. Broxson, 684

54. Plaintiff declared on a contract by which defendant promised to pay in consideration that plaintiff would cure a certain negro belonging to defendant, and offered in evidence a contract by which defendant promised to pay in consideration that plaintiff would take said negro "and effect a cure *free of any charge for board*:" *Held*, that the contract offered was not admissible evidence under the declaration, the consideration therein expressed being different from that alleged in the declaration.—Jordan v. Roney, 758

55. Plaintiff undertook to take charge of a certain negro belonging to defendant, "and effect a cure of the same free of any charge for board," and defendant promised, in consideration thereof, to pay a stipulated sum "six months from the time that the cure of said negro is effected, or from the date that he is returned and pronounced well; the intention and understanding of the parties being, that a sound and perfect cure is to be effected, for which the said J (defendant) is willing to pay the above sum, otherwise he is not to pay anything:" *Held*, that the legal effect of defendant's promise was, to pay the sum stipulated six months after a perfect cure had been effected, or six months from the time when the negro was returned perfectly cured; that plaintiff's declaration when he returned the negro, "that he was well," was admissible evidence for him, not as evidence of the fact that a cure had been effected, but to show that plaintiff had returned him as well, and thus fix the time when the six months would commence to run; and that evidence of the negro's condition more than six months after his return, was admissible to show that he was not perfectly cured when returned. 758

56. In a claim suit under the statute, where the plaintiff in execution attacks the *bona fides* of the deed executed to the claimant by the defendant in execution, as having been made with intent to hinder and delay the grantor's creditors. evidence that the grantor executed another deed on the same day to the same grantee, who was his son and a minor, that the grantor was in embarrassed circumstances at the time, and that the two deeds conveyed all his property in this State, is relevant to the issue, and its weight must be determined by the jury.—Benning v. Nelson, 801

57. A memorandum in the hand-writing of the clerk, on the margin of the execution docket, is not evidence of the issue and return of an execution, unless its existence at one time and subsequent loss are first proved.—Hanna, adm'r, v. Price et al., 826

58. In an appeal case from a justice of the peace. the judgment entry recited a verdict for plaintiff, but did not state the amount of it; on the judge's docket was a memorandum, in his hand-writing, in these words: "Jury and verdict for plaintiff, and fifteen per cent. damages;" and certain notes were found among the papers of the cause,

corresponding with the pleadings: *Held*, that this evidence was not sufficient to authorize the entering of a judgment *nunc pro tunc* at a subsequent term for the amount of the notes.—Dickens v. Bush, 849

EXCEPTIONS, BILL OF.

1. When the bill of exceptions does not show whether a notice was written or verbal, the Appellate Court, construing the bill most strongly against the plaintiff in error, will presume, if necessary, that it was written.—Harris v. Rowland's Adm'rs, 644
2. When a paper is appended to the answer to an interrogatory, and the interrogatory itself is not set out in the record, the Appellate Court will presume, against the plaintiff in error, that the answer was responsive to the interrogatory; and plaintiff in error being thus held to have called for the production of the paper, he cannot object to its having been read in evidence by defendant.—Furlow's Adm'r v. Merrell, 705
3. In detinue by the husband's administrator, after the death of the wife, for a slave bequeathed to her by her maiden name, "entirely for her and her children," the will was construed to give her a life estate only if she was unmarried when the will took effect, but an absolute estate jointly with her children if she was then married and had any; and the record contained no evidence that she was then married: *Held*, that, construing the bill of exceptions most strongly against the plaintiff in error, it would be presumed that she was then unmarried. 705
4. The party excepting is only required to set out in the bill of exceptions so much of the evidence as may be necessary to show that the court erred in its rulings; and a reversal necessarily follows, unless the record also shows that no injury resulted from the error.—Sackett & Shelton v. McCord, 851
5. When the bill of exceptions states that the ruling of the court "was objected to" at the time it was made on the trial, it is sufficient. 851

EXECUTION.

1. On a motion to set aside the sheriff's return on an execution, it is competent for the defendant in execution to show that the money had been paid as the return showed, and had been tendered and refused, and by tendering it anew to avoid interest and any further issue of execution; and if he fails to do this, he cannot come into equity for relief, unless he explains the omission satisfactorily.—Minter and Gayle v. Branch Bank at Mobile, 762
2. An execution in the name of "Henry W. Collier, use of officers of court," is not void, but furnishes a protection to the officer levying it, if issued by a court of competent jurisdiction; the words "use of officers of court" may be rejected as surplusage.—McElhaney v. Flynn, 819
3. A memorandum in the hand-writing of the clerk, on the margin of the execution docket, is not evidence of the issue and return of an execution, unless its existence at one time and subsequent loss are first proved.—Hanna, adm'r, v. Price et al., 826

EXECUTORS AND ADMINISTRATORS.

1. In detinue by an administrator *de bonis non* against a purchaser from the widow, who was named executrix in the will, for the recovery of a slave bequeathed to her for life, her legal appointment and qualification as executrix may be presumed after the lapse of twenty years, without the production of the record, from the existence and production of the will and its probate, an inventory and appraisement of the estate purporting on its face to be made under the authority and sanction of the court, and proof that the executrix acted as such from the testator's death until her own, paid the debts of the estate, kept the property together as directed by the will, and exercised ownership and control over it; that the heirs and legatees acquiesced in her acts and deeds in reference to the property for more than twenty years, and that the records of the Court of Probate of the county in which the will was probated were loosely kept for a series of years about that time.—Gantt's Adm'r v. Phillips, 275

2. And in such case, the inventory and appraisement, and evidence of the acts and declarations of the executrix, legatees and distributees, are admissible, as laying the predicate for the court to leave to the jury the question of the legal appointment and qualification of the executrix. 275

3. If the executrix named in the will to whom a life estate in slaves is bequeathed, takes out letters testamentary, and takes possession of the estate, returning an inventory thereof, her legacy thereby vests in her, unless she expressly dissents from the will; and the remainder limited upon her life estate becomes vested by the same act, and cannot on her death revert to the estate. 275

4. An executor's assent to a legacy may be inferred from any act or expression on his part clearly recognizing the legatee's present right to receive it.—George et al. v. Goldsby, 326

5. But where the executors and legatees enter into a written agreement with another person, who afterwards takes out letters of administration, by which they transfer the entire estate to him for a term of years, to be by him managed and retained until the debts are all paid, this does not amount to an assent to the legacies on the part of the executors. 326

6. When an administrator is cited by the Court of Probate to make final settlement, he cannot protect himself by plea setting up a written agreement, entered into between himself and the executors and legatees before letters of administration were granted to him, by which they transferred to him the entire estate for a term of years, to be by him managed and retained until all the debts were paid, and averring that he took possession of the estate and held it under the agreement, and not by the order of the court; such plea is bad on demurrer. 326

7. An attachment does not lie, under the statutes of this State, against a domestic executor or administrator, whose testator or intestate at the time of his death was a resident of this State.—Taliaferro v. Lane, 360

8. The requisition of the statute regulating sales by executors and administrators, which prescribes that the purchaser shall give "bond with approved security," (Clay's Digest 223 § 13,) is directory only, and not mandatory; and the failure to observe it does not render the sale void.—Lay's Ex'r v. Lawson's Adm'r, 377
9. When an order of sale made by the Orphans' Court does not on its face appear to have been granted on the application of the administrator, that fact will be presumed after the lapse of twenty years. 377
10. The administrator of an estate which has been declared insolvent has no right, under the statute, to bring ejectment for the recovery of lands belonging to the decedent.—Long v. McDougald's Adm'r, 413
11. An administratrix is entitled on final settlement to a credit for reasonable counsel fees paid in defending against a previous application for final settlement, to which she had been cited by the distributees before the expiration of eighteen months from the grant of letters.—Williamson & Wife v. Mason, 488
12. An administrator may discharge himself by showing that he delivered to his successor the assets of the estate which remained in his hands unadministered, and the admissions of the latter are competent evidence to prove that fact.—Bogle et al. v Bogle's Adm'r, 544
13. After the lapse of eighteen years the court will not force conclusions, nor draw any inference not clearly warranted by the evidence, in favor of a distributee who has had ample time and opportunity to assert his rights and has made no effort to do so until after the administrator's death. 544
14. Where the widow purchases property at the administrator's sale, giving her notes for the purchase money, and afterwards marries again, and her husband takes out letters of administration *de bonis non*, he becomes chargeable with his wife's debt to the estate. 544
15. A *bona fide* purchaser for valuable consideration at public sale by an executor *de son tort* acquires at least a possession and right of possession, which he can maintain against all the world except the legal representative of the decedent, and as against him an actual possession of which he can only be deprived by suit.—Woolfork's Adm'r v. Sullivan, 548
16. An executor or administrator has power under our statutes to compromise or settle without suit the choses in action belonging to the estate. 548
17. A decree of the Orphans' Court in favor of a distributee for a balance found in the administrator's hands, is evidence of assets in his hands to that amount, and sufficient to sustain a judgment on the bond against his sureties.—Holley v. Acre, 603
18. In debt on an administrator's bond, to charge his sureties with a judgment rendered against him as administrator to be levied *de bonis intestatis*, it is not necessary that the declaration should allege that the judgment was rendered on a debt which was a proper charge against the estate, or against the administrator as such.—Reid v. Nash, 733
19. A plea averring that the judgment against the administrator was not a proper debt or charge against the intestate, nor against his ad-

ministrator as such, is but the statement of a conclusion, and therefore demurrable. 733

20. A plea averring that the intestate's estate has been duly declared insolvent and is in progress of settlement. is fatally defective on demurrer. 733

21. So also is a plea containing the additional averment that plaintiff failed to present his judgment as a claim against the estate within six months after the declaration of insolvency. 733

22. A plea of *plene administravit* is bad on demurrer, if it does not allege that the assets were fully administered before suit brought. 733

23. The title to personal property descends to the personal representative, and the parties beneficially interested take as distributees under the statute.—Randall and Randall v. Lang, 751

24. A failure on the part of a creditor to present his claim to the administrator of the principal debtor within eighteen months after the grant of letters, does not discharge the sureties, nor affect his right to proceed against them.—Minter and Gayle v. Br. Bk. Mobile, 762

25. A foreign executor may sue in the courts of this State; and if he makes profert of his letters, the effect is the same as if they were set out in the declaration, although he does not aver in what State they were granted.—Carr's Ex'r v. Wyley, 821

26. To authorize a summary judgment against the sureties of an administrator, the record must show the judgment against the administrator, the bond by which the sureties have become liable, the issue of an execution on the judgment against the administrator, and its return "no property found.'—Hanna, adm'r, v. Price et al., 826

FORCIBLE ENTRY AND DETAINER.

1. To sustain the action for forcible entry and detainer, the plaintiff must show that defendant has forcibly entered his premises, and that he actually detains the possession either by himself in person or by another to whom, after obtaining it by force, he has delivered it to be kept for him; and the fact that the person to whom he delivers the possession had been his tenant before the premises went into the possession of the plaintiff, makes no difference.—McGonegal v. Walker, 361

2. The bare removal of plaintiff's fence, if defendant enters peaceably, would not convert his entry or detainer into a forcible one. 361

FRAUDS, STATUTE OF.

1. A promise to pay the debt or demand of a third person, unless reduced to writing and upon a legal consideration, is void under the statute of frauds.—Hollingsworth v. Martin, 591

2. A verbal contract to pay for improvements on land held adversely to the promisor, in consideration that the tenant would attorn to him and pay him rent for his unexpired term, is not within the statute of frauds of this State.—Cassell v. Collins, 676

FRAUDULENT CONVEYANCES.

1. Where a deed of trust, conveying both real and personal property, is found fraudulent and void because made to hinder and delay the grantor's creditors, in a claim suit under the statute between a judg-

ment creditor of the grantor and a purchaser under the deed, the claimant is not concluded by that verdict and judgment, as to the *bona fides* of the deed, in a suit subsequently brought against him by a purchaser at sheriff's sale under the same judgment, to recover the lands conveyed by the deed, which defendant bought at the trustee's sale under the deed; and the record of the former suit is not admissible evidence against the defendant in the latter case.—Crutchfield v. Hudson, 393

2. A creditor who receives his *pro rata* share of the proceeds of sale under a deed of trust, is not thereby estopped from attacking the deed for fraud. 393

3. A voluntary deed or relinquishment from father to son is good, as against the grantor's subsequent creditors, when no actual fraud is shown.—Randall and Randall v. Lang, 751

4. The assent of a creditor to a deed of trust of which he is the beneficiary will be presumed, and the deed becomes perfect on its execution as against other judgment creditors who afterwards levy executions on the property; but if the deed is made with intent to hinder and delay creditors, an actual assent by the beneficiary before the levy of an execution is necessary, to render it valid as against the plaintiff in execution.—Benning v. Nelson, 801

FUTURE INTERESTS IN REAL AND PERSONAL PROPERTY.

1. The rule in Shelley's case enlarges the estate of the first taker only when his heirs general, or the heirs of his body, are the objects of the limitation, and when they take by descent from him, and not as purchasers under the deed; it therefore has no application when the deed is to the husband, for his life and that of his wife, with contingent remainder to the heirs of the body of the wife who may survive them.—Williamson & Wife v. Mason, 488

2. A contingent interest in personal property, or *quasi* contingent remainder, may be created by deed without the intervention of a trustee. 488

3. A contingent remainder in slaves may be created by deed.—Price et al. v. Price's Adm'r, 609

4. A sale by one having a life estate in slaves does not destroy a contingent remainder limited thereon. 609

5. A *quasi* reversionary interest in personal property may be created by deed, as upon a gift for life with contingent remainder.—McWilliams et al. v. Ramsay, adm'r. 813

GUARANTY.

See Contract and Agreement.

GUARDIAN AND WARD.

1. The Court of Probate can only authorize a public sale by a guardian in the manner prescribed by the statute; a private sale under an order of the court though, sanctioned by the court, passes no title as against the ward.—Hudson v. Holmes' Executors, 585

2. If a guardian sells his ward's property at private sale, he is guilty of a conversion, and is chargeable on final settlement with the value of the property at the time of the conversion or of settlement, or at any

intermediate time, and interest on that value from the time of conversion. 585

HABEAS CORPUS.

1. The question of freedom, as between master and slave, can only be tried in the manner prescribed by the statute; but when negroes are levied on by the sheriff, as the property of the defendant in execution, they may try the question of their freedom, as between him and them, by petition for *habeas corpus*.—Union Bank of Tenn. v. Benham, 143

HUSBAND AND WIFE.

1. If the husband turn his wife out of doors, or by his misconduct compel her to leave him, he is responsible for necessaries furnished her by another; but the labor and services of slaves applied to the support and maintenance of the wife, cannot be regarded as necessaries, though their value was not more than sufficient for her necessary support and maintenance, nor can the husband be charged with their value in a court of law.—Zeigler & Hall v. David, 127
2. Where counsel are retained by husband and wife jointly, to sue for and recover the wife's property, and a decree therefor is rendered in their joint names, if the husband dies before the execution of the decree by a delivery of the property to him, or to some person for him who holds as his bailee, the wife is entitled to it as property never reduced into the husband's possession.—Mason v. McNeill's Ex'rs, 201
3. The fact that the plaintiffs' counsel, after the rendition of the decree, permits the negroes in suit to remain with the persons to whom they were hired for the year, and does not take possession of them until after the husband's death, though he might have taken possession immediately, does not amount to constructive possession in the husband. 201
4. Under the act of February 5, 1846, an attachment lies against husband and wife, non-residents, to subject the wife's separate estate, secured to her by ante-nuptial contract, to the satisfaction of a debt contracted by her *dum sola*.—Crocker & Wife v. Clements' Adm'r, 296
5. The deed of husband and wife leasing the wife's interest in land, unless acknoweledged by her on private examination pursuant to the statute, (Clay's Dig. 155 § 27,) is absolutely void as to her, and incapable of confirmation, except by acts amounting to a re-delivery.—George et al. v. Goldsby, 326
6. The husband's assignee for valuable consideration is not entitled to the wife's choses in action, as against her surviving, unless he reduces them into possession during the coverture. 326
7. The rule now well settled in relation to ante-nuptial deeds is this: that to prevent the husband's marital rights from attaching to the wife's personal chattels, the deed itself must show a clear and plain intention to exclude them.—Mitchell, adm'r, v. Gates, 438
8. A deed executed by a feme sole the day before her marriage with an insolvent man, conveying all her property real and personal to a trustee, in trust that he "shall permit her to remain in quiet and peaceable possession" of the same, "and take the profits thereof to her own use, and the increase, interest and income thereof to her own use and

benefit during her natural life, and at her decease to descend and go to her heirs absolutely forever," does not exclude the husband's marital rights. 438

9. The condition of the parties at the time the deed was made is admissible evidence, but the acts and declarations of the husband after marriage cannot be received to show the true construction of the deed. 438

10. An ante-nuptial contract stipulated that the husband should "receive and enjoy. during the life-times of" himself and wife, "all the rights and profits of the" wife, "and at their decease to descend to the heirs of the body of the" wife "which may survive at that time;" and that the wife "should have no part or portion of the property now owned by" the husband "after his death:" *Held*, that the marital rights of the husband were not excluded by the deed, but, having reduced the wife's property into possession during coverture, he thereby became entitled to it until the death of himself and wife as absolute owner, subject to the contingent limitation to the heirs of the body of the wife who might be living at that time.—Williamson & Wife v. Mason, 488

11 A married woman cannot dispose of her interest in real estate, except in the manner prescribed by the statute.—(Clay's Digest 155 § 27.) —Beene's Heirs v. Randall's Heirs, 514

12. Where the widow purchases property at the administrator's sale, giving her notes for the purchase money, and afterwards marries again, and her husband takes out letters of administration *de bonis non*, he becomes chargeable with his wife's debt to the estate.—Bogle et al. v. Bogle's Adm'r, 544

13. Under the act of 1848, securing to married women their separate estates, a *feme covert* may charge, sell or dispose of her property without the consent or concurrence of her husband.—Hooper's Ex'r v. Smith and Wife, 639

14 The wife is a necessary party to a proceeding to compel a final settlement of her guardianship of a minor child, and a decree against her husband only is erroneous.—McGinty v. Mabry, 672

15. A testator bequeathed a slave to one of his daughters, by her maiden name, "*entirely* for her and her children," and gave others specific legacies of slaves with incumbrances on them: *Held*, that the word "entirely" did not exclude the marital rights of the husband, but had reference only to the quantity of the estate which the legatee took as compared with the others; that, if she was unmarried at the time the will took effect, she took a life estate only, with remainder to her children; but if she was then married and had children, she took an absolute estate jointly with them.—Furlow's Adm'r v. Merrell, 705

16. When the husband has abjured the State, and his wife has acted as a *feme sole*, she will be so regarded; but to constitute an abjuration by him, there must be an abandonment of the wife and a removal from the State without the intention of returning.—Krebs v. O'Grady, 726

17. The wife may, however, act as her husband's agent during his absence from the State, and as such, with his assent express or implied, may transfer a note which she has taken payable to herself. 726

18. The husband having gone to California, his wife continued to carry on

his business, (a bakery,) and sold a part of the furniture and fixtures, taking notes payable to herself, which she afterwards transferred: *Held*, that these circumstances did not amount to presumptive evidence of her authority to transfer the notes, but the jury must decide whether they were sufficient to establish it. 726

19. A husband conveyed by deed certain negroes to a trustee, in trust 'for the use, behoof and benefit of the grantor's wife forever; *Provided*, however, that the title or property in said slaves should be and remain in the trustee for the use and behoof of the wife, her heirs, executors and assigns, during her natural life only, with remainder to the heirs of her body by the grantor who might be living at her death; and, in default of such issue living at that time, the title and property in said slaves to revert to the grantor if living, but if dead to descend to his heirs at law:' *Held*,
   I. That the deed, as against the husband, created a *separate estate* in the wife in the property conveyed;
   II. That the proviso was not repugant to the preceding clause, but its effect was to limit the wife's interest to a life estate;
   III. That the *quasi* contingent remainder to the heirs of the body of the wife by the grantor who might be living at her death, was not too remote;
   IV. That a *quasi* reversionary interest remained in the grantor; and on his death, his wife surviving, this reversionary interest passed to his administrator, and was assets in his hands.—McWilliams et al. v. Ramsay, adm'r, 813
20. When a husband conveys personal property to a trustee for the use and benefit of his wife, she takes a separate estate in the property as against him. 813

INDIAN RESERVATIONS.

See EJECTMENT, 6.

INSOLVENT ESTATES.

1. In an action at law in the United States courts, a plea by an administrator setting up a decree of a State court by which the estate of his intestate was declared insolvent, is no bar to the rendition of judgment; but, when the estate is actually insolvent, the judgment at law will be enjoined in equity, and the creditor be compelled to come in and take his place with the other creditors of the estate.—Byrne, adm'r, v. McDow, 404
2. But a decree of insolvency by a State court does not preclude a creditor, even in the United States courts of chancery, from denying the truth of the decree, and showing that the estate is solvent when its assets are fairly stated. 404
3. By the law of this State in 1840, a decree of insolvency might be obtained when the personal property alone was insufficient to pay all the debts, though the real estate might be more than sufficient for that purpose; but such a decree would not be conclusive evidence of the fact of insolvency in the United States chancery courts. 404
4. Where a judgment is rendered against an administrator in a Federal

court, notwithstanding a plea of the insolvency of his intestate's estate, and execution thereon being returned no property found, the creditor institutes an action of debt on the judgment suggesting a *devastavit*, to enjoin which the administrator files a bill in equity, if the proof shows that the estate is really solvent, the bill will be dismissed, and the creditor allowed to pursue his remedy. 404

5. The administrator of an estate which has been declared insolvent has no right, under the statute, to bring ejectment for the recovery of lands belonging to the decedent.—Long v. McDougald's Adm'r, 413

6. After an estate is reported insolvent, the only vouchers for money paid out that can be allowed on settlement with the administrator are for the "last sickness and necessary funeral expenses," (Clay's Digest 192 § 2;) and if the court, on due notice to the creditors, states an account, giving the administrator credit for "receipts, vouchers and allowances" exceeding the amount of assets received by him, the settlement is unauthorized by law, and the administrator may be again cited by a creditor of the estate to settle his accounts —Shadden v. Sterling's Adm'rs, 518

7. The heir at law may sue for and recover rents accruing after the death of his ancestor, whose estate has been declared insolvent, if neither the administrator nor creditors interpose any obstacle.–Branch Bank at Mobile v. Fry, 770

8. A decree of the Probate Court on the settlement of an insolvent estate having been reversed on appeal, and the cause remanded, the certificate of the clerk of the Supreme Court to the court below recited the decree of said primary court, "requiring the executors to settle up before the court would hear the contest among the several creditors upon the objections filed, which, being brought before the Supreme Court by appeal, was reversed, annulled," &c.; while the opinion showed that the decree was reversed because "it was not proper to do either just then:" *Held*, that the object of the certificate simply was to inform the primary court what action the Supreme Court had taken on its decree, while the opinion showed the reasons of that action and the course indicated for the future progress of the cause; and that the certificate did not require the court to hear and determine the contests among the creditors before proceeding to a settlement with the executors.—Weaver's Ex'rs v. Weaver's Creditors, . 789

9. Where an estate was reported insolvent prior to the passage of the act of 1843, and in progress of settlement, all the subsequent proceedings must conform to the provisions of that act. 789

10. The retroactive effect thus given to the act of 1843 does not conflict with any constitutional provision, nor does it deprive the executor of any vested right personal to himself, which he could have insisted on under the previous law; it only works a revocation of his letters testamentary, and changes the mode of proceeding to a final settlement of the estate. 789

11. Under the act of 1843, a settlement with the executor and the election of an administrator *de bonis non* must be had, before the court can proceed to hear and determine the contests among the creditors; the settlement with the executor and the election of an administra-

tor may precede each other according to the convenience of the parties, with the assent of the court, but no final judgment can be rendered against the executor until his successor is qualified. 789

INSURANCE.

See CUSTOM.

INTEREST.

1. The Courts of Chancery allow interest whenever it would have been recoverable at law.—Crocker and Wife v. Clements' Adm'r, 296
2. When the defendant receives rents under an implied trust for his cotenant, he is chargeable with interest on the amount found in his hands from the time of its receipt.—Tarleton v. Goldthwaite's Heirs and Adm'r, 346
3. When an agent lends out the money of his principal at a usurious rate of interest, the fact of the agency does not affect the illegality of the contract, or avoid the effect of the statute against usury.—Pearson et al. v. Bailey, 537
4. If a contract is usurious in its inception, no renewal of the note, or other change in the form of the contract, can alter its original character, but the taint of usury follows it even into the hands of a *bona fide* holder, unless he receives it through the fraud of the maker. 537
5. If the borrower comes into equity for relief against a usurious contract, he will be compelled to pay the amount of the principal and legal interest thereon; and if the debt is secured by mortgage, the mortgage stands as a security for that amount. 537

JUDGMENTS AND DECREES.

1. Where the affairs of a Bank are by statute placed in the hands of trustees for settlement, after a judgment has been rendered on *quo warranto* against the Bank declaring its charter forfeited, the subsequent reversal of that judgment does not affect a suit previously instituted by the trustees against a debtor of the Bank, nor can he take advantage of that reversal to protect himself against the rendition of judgment.—Jemison v. P. & M. Bank, 168
2. In assumpsit, some of the plaintiff's claims having been excluded from the jury under the charge of the court, plaintiff moved for a new trial; whereupon it was ordered "that a new trial be granted, unless the defendants enter into an agreement of record, that upon any future settlement in chancery, or bill filed for an account between said parties, or any transaction between said defendants and H. & F., the said defendants will not plead the verdict and judgment in said cause, or use the same in any manner to bar the claim of said plaintiffs or said H. & F. for an account and settlement in relation to" said excluded claims, "all of which were included in the account produced and read to the jury by the plaintiffs on the trial; and thereupon came said defendants by attorney, and covenant and agree to the above terms imposed by the court, and it is thereupon considered by the court that the said motion for a new trial be overruled: *Held*, that the effect of this order and agreement was to exempt the

excluded claims from the effect of the judgment, and that plaintiffs might use them as a set-off in an action at law subsequently brought against them by defendant.—Hoyt, Ford & Robinson v. Murphy, 456

3. The motion docket is a book of the court required by law to be kept by the clerk, and the entries in it may be looked to as showing the orders taken by the court, and are sufficient evidence to authorize the rendition of judgment *nunc pro tunc*.—Yonge v. Broxson, 684

4. In an appeal case from a justice of the peace, the judgment entry recited a verdict for plaintiff, but did not state the amount of it; on the judge's docket was a memorandum, in his hand-writing, in these words: "Jury and verdict for plaintiff, and fifteen per cent. damages;" and certain notes were found among the papers of the cause, corresponding with the pleadings: *Held*, that this evidence was not sufficient to authorize the entering of a judgment *nunc pro tunc* at a subsequent term for the amount of the notes.—Dickens v. Bush, 849

JUDICIAL SALES.

1. The requisition of the statute regulating sales by executors and administrators, which prescribes that the purchaser shall give "bond with approved security," (Clay's Digest 223 § 13,) is directory only, and not mandatory; and the failure to observe it does not render the sale void.—Lay's Ex'r v. Lawson's Adm'r, 377

2. When an order of sale made by the Orphans' Court does not on its face appear to have been granted on the application of the administrator, that fact will be presumed after the lapse of twenty years. 377

3. A purchaser at an administrator's sale, who does not give bond with approved security as required by the statute, but takes possession of the property, holds adversely to the administrator, and may acquire a perfect title under the statute of limitations of six years. 377

4. The Orphans' Court having granted an order of sale of "all the *perishable* property" belonging to an estate, the administrator proceeded under it to sell all the *personal* property, including the negroes, and made due return of the sale to the court, which was received and ordered to be recorded; and the administrator *de bonis non* afterwards brought detinue for one of the negroes sold: *Held*, that in the absence of a statutory definition of the term "*perishable* property," as applied to the estates of decedents, the order should receive the same interpretation given to it by the court that made it and the parties acting under it, and that the sale passed the legal title to the slaves.—Steele v. Wyatt's Adm'r, 764

JURISDICTION.

1. When the defendant in a bastardy proceeding enters into a recognizance for his appearance at court, and his surety in the bond afterwards becomes judge of probate, the latter is incompetent by reason of interest to preside on the trial of the cause, and any proceedings therein had before him are *coram non judice* and void.—The State ex rel. Claunch v. Castleberry, 85

2. A plea to the jurisdiction, when pleaded in a court of general jurisdiction, is bad on demurrer, if it does not point out what other court

has jurisdiction, and conclude with the prayer "whether the court will or ought to take further cognizance of the plea aforesaid.—Fields v. Walker et al., 155
3. Appearance and consent cannot give jurisdiction. 155
4. In a summary proceeding by notice and motion against a Bank debtor, if the proper certificate is appended to the notice, that the note is really and *bona fide* the property of the Bank, the certificate is proof of the jurisdictional fact to the end of the suit, although the note is sold or assigned before judgment.—Jemison v. P. & M. Bank, 168

JUSTICES OF THE PEACE.

1. When a defendant, against whom a judgment is rendered by a justice of the peace, removes the case by appeal to the Circuit Court, he is regarded as the actor in the subsequent proceedings, and is held to be constantly in court.—Martin v. Higgins, 775
2. The notice to the appellee, required in appeal cases from justices of the peace, is intended solely for the benefit of the appellee, and the appellant cannot complain on error that it was not given. 775
3. "Plaintiff claims $50, for work and materials," held a sufficient statement to sustain a judgment by default and writ of inquiry. 775

LANDLORD AND TENANT.

1. Assumpsit lies in favor of the landlord against a stranger for rents received by the latter from the tenants under an assertion of title in himself.—Br. Bank Mobile v. Fry. 770
2. If the tenant pays over rents to the mortgagor after the law day of the mortgage, before notice of any claim by the mortgagee, the payment is effectual against the latter; nor does the mortgage constitute any objection to a recovery by the mortgagor against one who has wrongfully received the rents under an assertion of title, when it is not shown that the mortgagee has asserted any claim to the fund. 770

LEGACY.

See Executors and Administrators, 3, 4, 5.

LIMITATIONS, STATUTE OF.

1. The proviso to the first section of the act of 1843, applies only to that section, and does not extend to the whole act.—Rawls v. Doe ex dem. Kennedy, 240
2. The act of 1802, which bars rights of entry after the lapse of twenty years, is not repealed by the act of 1843, which limits all actions for the recovery of lands to ten years after the accrual of the cause of action; possessions commencing under the old law are governed by the act which first effects a bar in their favor. 240
3. Where the legal and equitable remedies by attachment are concurrent, the statute of limitations is the same in both forums.—Crocker & Wife v. Clements' Adm'r, 296
4. When a person receives money under a decree which is afterwards reversed on error, the statute of limitations commences to run in his favor from the reversal. 296
5. In making an application of the legal statute of limitations, the

Courts of Chancery also adopt and give effect to the exceptions and qualifications of the statute. 296

6. To effect the bar created by the statute, the defendant must have resided within the State during the whole period prescribed by it, but it is not necessary that his residence should have been continuous. 296

7. Where one tenant in common, having obtained a conveyance from his co-tenant for the purpose of mortgaging the entire estate, and bound himself to reconvey one half of the land after the mortgage is raised, rents out the premises, and collects the rents, he becomes, as to these rents and profits, a trustee by implication for his co-tenant, and when the latter seeks an account of them, the statute of limitations of six years will bar him.—Tarleton v. Goldthwaite's Heirs and Adm'r, 346

8. A purchaser at an administrator's sale, who does not give bond with approved security as required by the statute, but takes possession of the property, holds adversely to the administrator, and may acquire a perfect title under the statute of limitations of six years.—Lay's Ex'r v. Lawson's Adm'r, 377

9. Adverse possession for the time prescribed as a bar by the statute of limitations, may be given in evidence under the plea of the general issue in detinue. 377

10. The act of 1846 allowing several replications to a plea of the statute of limitations, and other pleas therein specified, applies to a plea setting up the statute of limitations of another State.—Thomason v. Odum, 480

11. The proviso to the statute of limitations of Florida in favor of persons "beyond the seas or out of the country," includes a resident citizen of another State who has never been in Florida. 480

12. A replication to a plea of the statute of limitations of another State, alleging that the property was converted in this State, and carried into another, where it was purchased by defendant and brought back again, and that it has not been in this State more than four years since the conversion, is bad on demurrer. 480

13. In summary proceedings by notice and motion against Bank debtors, the notice serves the double purpose of a writ and declaration, and prevents the statute of limitations from creating a bar, although the motion for judgment is afterwards delayed.—Stanley v. Bank of Mobile, 652

14. To remove the bar of the statute of limitations after it is complete, the admission must extend not only to the correctness of the original debt, but also to a present willingness or liability to pay it.—Pool's Ex'r v. Relfe et al., 701

15. A proposal by way of compromise to pay the principal, if the creditor would lose the interest, is not sufficient to remove the bar of the statute after it is complete 701

16. A letter containing an offer of compromise held not to be a conditional promise such as would become binding and remove the bar of the statute on proof of the facts denied in it. 701

17. When a debt is secured by the assignment of a mortgage, the security is not impaired by the statute of limitations barring a recovery on the note.—Cullum et al. v. Branch Bank Mobile, 797

MANDAMUS.

1. When a judge of probate improperly refuses to transfer to the Circuit Court a cause in which he is personally interested, *mandamus* lies to compel its transfer.—Shadden v. Sterling's Adm'rs, 518
2. A writ of error does not lie from the refusal of a probate judge to proceed with the settlement of the accounts of an administrator of an insolvent estate, to which he had been cited by a creditor, and his dismissal of the citation; if the judge improperly dismisses the citation and refuses to proceed, *mandamus* lies to compel his action. 518

MORTGAGE.

1. If the tenant pays over rents to the mortgagor after the law day of the mortgage, before notice of any claim by the mortgagee, the payment is effectual against the latter; nor does the mortgage constitute any objection to a recovery by the mortgagor against one who has wrongfully received the rents under an assertion of title, when it is not shown that the mortgagee has asserted any claim to the fund.—Branch Bank at Mobile v. Fry, 770
2. When a mortgage is assigned by the principal debtor to a trustee for the protection of his surety, with authority to collect the mortgage notes and pay the debt out of the proceeds on default being made in its payment, the creditor is entitled to the benefit of the security.—Cullum et al. v. Branch Bank at Mobile, 797
3. When a debt is secured by the assignment of a mortgage, the security is not impaired by the statute of limitations barring a recovery on the note. 797
4. Nor does the renewal of the note affect the security, although no express understanding is made in relation to its continuing. 797
5. When a creditor, whose debt is secured by the assignment of a mortgage, purchases a judgment which constitutes a prior lien on the mortgaged premises, at the request of his debtor, and with the express understanding that it shall be tacked to the mortgage and paid out of the fund, he is entitled in equity to have it tacked to his mortgage and paid out of the fund. 797

PARTNERSHIP.

1. When one partner takes a bond from his co-partner on the dissolution of the partnership, conditioned that the obligor shall pay all the debts of the firm, and the latter afterwards brings a suit at law, the obligee is an incompetent witness for the defendant to prove that a debt offered as a set-off "was due from said firm at the time of its dissolution, and that it was acknowledged to be due; also to prove the amount of the debt, and what it was for."—Hoyt, Ford & Robinson v. Murphy, 456
2. When a partner purchases his co-partner's entire interest in the firm, undertaking to pay all the partnership debts, and afterwards absconds, leaving his individual debts and those of the partnership unpaid, a court of equity will re-invest the retiring partner with his original rights as partner, giving him a lien on the partnership assets for the payment of the partnership debts. (Ligon J. *dissenting*.)—McGown v. Sprague et al. 524

3 When a note payable to a partnership is transferred by one of the partners in payment of his individual debts, the purchaser acquires only the assignor's interest, and holds the note subject in equity to the claim of the other partners.—Halstead et al. v. Shepard, 558

4 And an assignee who purchases for cash, after the maturity of the note and while it is in the hands of an attorney for suit, relying upon his assignor's representations as to the state of accounts between his co-partner and himself and his right to dispose of the note, is affected with notice of the other partner's interest upon a settlement of the partnership accounts. 558

5. Ordinarily, during the existence of the partnership, one partner, acting within the scope of the partnership business, may sell and dispose of the entire interest in the partnership effects; but when the firm, though not formally dissolved, has closed its business, and reduced all its assets to the shape of two notes payable to the firm, if one partner fraudulently transfers these, the purchaser takes them subject to the other partner's equity. 558

6. When money is advanced by one partner out of his individual funds, to be invested with other moneys belonging to the partnership in the purchase of real estate for the joint benefit of all the partners, and the purchase is made by another partner, who takes the legal title in his own name, a trust is created in favor of the individual members of the firm, which a court of equity would enforce.—Owens v. Collins & Langworthy, 837

7. But the partner thus advancing his money would have the right, at any time before the appropriation was actually made, to change his intention, and direct a different application of it; and the subsequent application of his funds in the manner which he had first authorized, would create a trust, if at all, in his favor alone. 837

8. When a bill is filed to enforce a trust growing out of partnership transactions between complainants and defendant, or a joint trust in favor of complainants individually, and the evidence shows a separate trust in favor of one of the complainants only, the discrepancy between the *allegata* and *probata* is fatal. 837

9. When lands are purchased with partnership funds, and for partnership purposes, equity regards them as partnership property, and it is immaterial in whose name the purchase is made; but when the bill alleges both facts, while the proof shows a purchase by one partner for partnership purposes with his individual funds, the proof does not sustain the case made by the bill. 837

PLEADING AND PRACTICE AT LAW.

1. An order of court for a change of venue, which recites that, by consent of parties made in open court, it is agreed that the cause shall go to either one of two specified counties at the election of the plaintiff, is incomplete, until the plaintiff has made his election between the counties named, and the court has acted on his election by ordering the papers in the cause to be transmitted by the clerk to the county so chosen.—Ex parte Remson, 25

2. A party against whom an injunction or process of seizure has been

obtained in a chancery suit, and who has been injured in consequence thereof, may, after the dismissal of the bill for want of prosecution, bring his action at law, without permission from the Chancery Court, to recover on the bond of indemnity required by the *fiat* as a prerequisite to obtaining the process.—Zeigler and Hall v. David, 127

3. In such case, an averment that the bill was dismissed, without stating the grounds of dismissal, is sufficient. 127

4. And it is unnecessary to aver notice of the dismissal to the obligors in the bond, as they are parties to the record, and presumed to be cognizant of the disposition finally made of the cause. 127

5. It is not error to allow plaintiff to amend his declaration, even after the trial has been commenced, by the alteration of a date alleged under a *videlicet*. 127

6. A plea to the jurisdiction, when pleaded in a court of general jurisdiction, is bad on demurrer, if it does not point out what other court has jurisdiction, and conclude with the prayer "whether the court will or ought to take further cognizance of the plea aforesaid." 127

7. Matter amounting to the plea of *res adjudicata* cannot be pleaded in abatement.---Fields v. Walker et al., 155

8. In detinue for a slave, a plea alleging the slave's death since the last continuance is bad on demurrer.---Lay's Ex'r v. Lawson's Adm'r, 377

9. The court is not authorized to reject a plea containing matter which may be good, even though it is improperly pleaded.---Stewart & Fontaine v. Hargrove, 429

10. The act of 1846 allowing several replications to a plea of the statute of limitations, and other pleas therein specified, (Pamphlet Acts 36,) applies to a plea setting up the statute of limitations of another State.---Thomason v. Odum, 480

11. In debt on an administrator's bond, a count on the penalty alone, not noticing the condition, is sufficient.---Holley v. Acre, 603

12. Appearance and pleading to issue amounts to a waiver of all exceptions to previous irregularities.---Stanley v. Bank of Mobile, 652

13. When a partnership is plaintiff, and the christian names of the partners are nowhere set out in the summons or declaration, if defendant neither pleads in abatement, nor demurs, but goes to trial on a plea to the action, he will be held to have waived the defect, and cannot assign it for error.---Ortez v. Jewett & Co., 662

14. When suit is brought in the courts of Alabama, for an injury to lands averred to be located in "the State of Georgia, to-wit: in the county aforesaid," a demurrer would not lie to the declaration, and a joinder in issue by defendant would not amount to a waiver of the jurisdictional question which would arise if the evidence showed that the land was located in Georgia.---Howard v. Ingersoll, 673

15. When the clerk's name is subscribed to a writ, to which is attached an affidavit that the name was subscribed by the affiant by authority of the clerk, the affiant must be taken to have been the clerk's deputy, and the writ is properly issued.---Yonge v. Broxson, 684

16. It is not necessary that a writ should on its face specify the place at which the court is to be held, or the first day of the term to which it is returnable; these are fixed by law, and suitors are presumed to be

cognizant of them. 684
17. The fact that a writ is addressed "to any lawful officer" of a specified county, instead of "any sheriff of the State of Alabama," is matter of abatement only, and not available on error. 684
18. From the time the original process is served, until the final judgment, the parties are presumed to be in court, and need no further notice of the orders there taken in reference to the case. 684
19. When suit is brought on a note in the name of the payee for the use of another person, if the defendant does not by plea deny its execution, the note itself imports a consideration, and this presumption is not repelled by showing that the payee "never was the owner of the note, and never put it in circulation or authorized it to be done."—Bird v. Wooley, use &c., 717
20. In debt on an administrator's bond, to charge his sureties with a judgment rendered against him as administrator to be levied *de bonis intestatis*, it is not necessary that the declaration should allege that the judgment was rendered on a debt which was a proper charge against the estate, or against the administrator as such.-Reid v. Nash, 733
21. When the record shows that pleas were filed and demurred to, the pleas found in the record will be presumed to be those which were filed, although they are not signed by counsel, nor endorsed as filed. 733
22. *Nil debet* and performance generally are not good pleas to debt on bond assigning special breaches. 733
23. A plea averring that the judgment against the administrator was not a proper debt or charge against the intestate, nor against his administrator as such, is but the statement of a conclusion, and therefore demurrable. 733
24. A plea averring that the intestate's estate has been duly declared insolvent and is in progress of settlement, is fatally defective on demurrer. 733
25. So also is a plea containing the additional averment that plaintiff failed to present his judgment as a claim against the estate within six months after the declaration of insolvency. 733
26. A plea of *plene administravit* is bad on demurrer, if it does not allege that the assets were fully administered before suit brought. 733
27. Consent to "plead in short," where a demurrer is isterposed, dispenses only with formal matters, and not with matters of substance; if a plea is pleaded by name, all material averments will be considered as made; but if it is partly drawn out, the want of a material averment is fatal. 733
28. "Plaintiff claims $50, for work and materials," held a sufficient statement to sustain a judgment by defanlt and writ of inquiry.—Martin v. Higgins, 775
29. An action of debt lies on a bond conditioned that the obligor shall indemnify the obligee against his guaranty of a third person which had been given at the obligor's request.—Carr's Ex'r v. Wyley, 821
30. A foreign executor may sue in the courts of this State; and if he makes profert of his letters, the effect is the same as if they were set out in the declaration, although he does not aver in what State they were granted. 821

PRESUMPTIONS AND LEGAL INTENDMENTS.

1. When evidence is adduced to the court on a preliminary examination touching the incompetency of a witness by reason of insanity, the Appellate Court will presume that the judge was not influenced by any evidence which he ought not to have considered.—Campbell v. The State, 44
2. When a deed is made to two jointly, the law, in the absence of proof as to their respective interests, presumes that they are equally interested; and the transfer by one of them, by words *in præsenti*, of all his right, title and interest in the lands, conveys a moiety.—Long v. McDougald's Adm'r, 413
3. When an order of sale made by the Orphans' Court does not on its face appear to have been granted on the application of the administrator, that fact will be presumed after the lapse of twenty years.—Lay's Ex'r v. Lawson's Adm'r, 377
4. Where the record shows an irregular final settlement of an estate, the court will presume in favor of its correctness, after the lapse of twenty years, that the necessary notices were given, and that the parties in interest were present.—Barnett's Ex'r v. Tarrence, 463
5. Where the slaves returned in the executor's inventory as belonging to the estate are divided by commissioners, under an order of the Orphans' Court, among the distributees, and after the lapse of twenty years one of the distributees attempts to charge the executor with the value of other slaves not included in the inventory, and shows no excuse for his delay, his claim cannot be asserted or allowed in the Orphans' Court. 463
6. Where a receipt bears date five days anterior to a note, and is for a different account, the court cannot, in the absence of proof explaining the incongruities, infer that they were given for the same debt.—Hollingsworth v. Martin, 591
7. It is not necessary that a writ should on its face specify the place at which the court is to be held, or the first day of the term to which it is returnable; these are fixed by law, and suitors are presumed to be cognizant of them.—Yonge v. Broxson, 684
8. From the time the original process is served, until the final judgment, the parties are presumed to be in court, and need no further notice of the orders there taken in reference to the case. 684
9. When the record shows that pleas were filed and demurred to, the pleas found in the record will be presumed to be those which were filed, although they are not signed by counsel, nor endorsed as filed.—Reid v. Nash, 733

PROBATE, COURT OF.

1. The action of the Probate Court under the act of February 11, 1850, upon questions of fact growing out of administrations, is a matter of law, and is revisable in the Appellate Court in the same manner as the decisions of the court on questions of fact which are referred to the court rather than to the jury; in such cases the Appellate Court will look to the whole evidence, if it is to be found in the record, and will not send the case back for another trial, if enough remains to

sustain the judgment rejecting testimony which may have been illegally admitted.—Bogle et al. v. Bogle's Adm'r, 544

2. The Court of Probate can only authorize a public sale by a guardian in the manner prescribed by the statute; a private sale under an order of the court, though sanctioned by the court, passes no title as against the ward.—Hudson v. Helmes' Ex'rs, 585

3. A decree of the Orphans' Court in favor of a distributee for a balance found in the administrator's hands, is evidence of assets in his hands to that amount, and sufficient to sustain a judgment on the bond against his sureties.—Holley v. Acre, 603

4. The Court of Probate can only allot dower in the mode prescribed by the statute, and in those lands of which the husband died seized; if the husband aliened in his life-time, and the purchaser has put valuable improvements on the lands, he may come into equity against his vendor's widow and heirs, to have the dower claim settled and deducted from the unpaid purchase money.—Thrasher and Mitchell v. Pinckard's Heirs and Adm'rs, 616

5. A decree of the Orphans' Court rendered prior to the passage of the act of 1846, in favor of an administrator *de bonis non* against a preceding administrator, for moneys received in the course of administration and unaccounted for, is not merely voidable, but void.—Hanna, adm'r, v. Price et al., 826

PROHIBITION.

1. The Supreme Court has a discretionary power to grant writs of prohibition to all the inferior courts of the State; but the writ should never be granted, except in cases where the inferior court has clearly exceeded its jurisdiction in the order complained of, and the relator has no other remedy to which he can resort for his protection.—Ex parte Morgan Smith, 94

2 An interlocutory order of the Chancellor, directing "*that a receiver be appointed* to take possession" of the defendant's estate, "and that he and either of the parties have leave to apply to the court for any other or further directions, as to him may be necessary; *and that it be referred to the register, to appoint a fit and proper person to be the receiver aforesaid*, the person so to be appointed first giving bond," &c., and directing the defendant to deliver up to him his plantation, &c,, is a nullity, and the writ of prohibition should go from the Supreme Court to revoke it, and prevent proceedings under it. (*Per* Justices LIGON, GOLDTHWAITE and PHELAN.)

(CHILTON, C. J., and GIBBONS, J., *dissenting*, held that the order was only, at most, an erroneous construction of the statute; that the relator should have first applied to the Chancellor, by petition, for a correction or modification of the order; and that, as the Chancellor had jurisdiction of the case made by the bill, and a discretion as to the appointment of a receiver, and had erred merely in the manner of making the appointment, the writ should not be granted.)—Ex Parte Morgan Smith, 94

PROMISSORY NOTES.

1. When a note is payable at a specified day for a sum certain which may be discharged by the payment of a less sum at an earlier day, the greater sum is not in the nature of a penalty, but is the debt actually due, and is recoverable if the less sum is not paid according to the terms of the note.—Carter v. Corley, use &c., 612
2. In an action against an endorser, parol evidence being adduced, in support of the certificate of notice annexed to the protest, that he kept no clerk, and that the notice was left at his office on the day of protest, the whole evidence should be referred to the jury, to decide whether he had actually received the notice.—Stanley v. Bk. Mobile, 652
3. A charge is erroneous which refers it to the jury "to decide as to the sufficiency of the notice" to charge an endorser; it is the province of the jury to ascertain the facts, while the court determines their legal sufficiency to constitute notice 652
4. When a notice of protest is left at the office of an endorser, who is an attorney and keeps no clerk, on the evening of the day on which it is required to be given, the law presumes that he received it, and it is sufficient to charge him. 652
5. When suit is brought on a note in the name of the payee for the use of another person, if the defendant does not by plea deny its execution, the note itself imports a consideration, and this presumption is not repelled by showing that the payee "never was the owner of the note, and never put it in circulation or authorized it to be done."—Bird v. Wooley, use &c., 717

REAL ACTIONS.

1. An action for damages for injuries done to land must be brought in the courts of the State in which the land is situated.—Howard v. Ingersoll, 673
2. When suit is brought in the courts of Alabama, for an injury to lands averred to be located in "the State of Georgia, to-wit: in the county aforesaid," a demurrer would not lie to the declaration, and a joinder in issue by defendant would not amount to a waiver of the jurisdictional question which would arise if the evidence showed that the land was located in Georgia. 673

REDEMPTION OF REAL ESTATE.

1. When a judgment debtor, or his assignee of the equity of redemption, files a bill to redeem lands sold under execution, he must allege in his bill the performance of all that the statute requires of him; if he fails to allege that possession was delivered to the purchaser without suit, his bill is without equity.—Paulling v. Meade, 505
2. When a judgment creditor files a bill to redeem, he must allege in his bill a tender of the amount of the purchaser's bid, together with ten per cent. thereon, and an offer to credit his judgment against the defendant with the further sum of ten per cent. on the amount of the bid. 505
3. When the defendant in execution files a bill to redeem, he must allege in his bill that he delivered possession to the purchaser without suit, or that the latter consented to his retention of possession as tenant.—Sandford v. Ochtalomi, 669

SEPARATE ESTATES OF MARRIED WOMEN.

See HUSBAND AND WIFE.

SHERIFFS.

1. When a sheriff is ruled for failing to make the money on an execution, which he had levied on certain negroes as the property of the defendant, he may rebut the *prima facie* liability which his return raises against him, by showing that the negroes were taken from his possession under a writ of *habeas corpus*, and were discharged as free persons; and the writ of *habeas corpus* and proceedings thereon are admissible evidence for that purpose.—Union Bank of Tenn. v. Bauham, 143
2. When negroes which are not at the time held as slaves, are levied on and discharged, the sheriff, when ruled, may repel the presumption arising from the levy, by showing that they were free. 143
3. When a sheriff is ruled for failing to make the money on an execution, evidence that the defendant in execution "was in possession of a house and lot, as of his own property, prior to the day on which the execution came to the sheriff's hands, claiming ownership thereof, and continued in possession until after the return day of the execution," is admissible evidence for plaintiff.—Whitsett, Garner & Co. v. Slater, 626
4. Evidence of general neighborhood rumor that certain slaves, in the possession of the defendant in execution, were the separate property of his wife, is not admissible evidence for the sheriff, either to show an excuse for not levying plaintiff's execution, or as tending "to show a reasonable excuse for not levying within a reasonable time for making necessary inquiries as to the title of the property." 626
5. What constitutes due diligence on the part of the sheriff depends materially on the facts of each case, and no general rule of universal application can be laid down by the courts; but where he receives an execution against a resident citizen of his county, who is in open possession of personal property sufficient to satisfy it, and he makes no effort, for thirty days after its reception, to levy or to give plaintiff notice of any real doubts which he may entertain of the liability of the property to the execution, he is guilty of a want of due diligence. 626
6. What constitutes due diligence on the part of the sheriff, is a mixed question of law and fact; the jury must determine the facts, while the court decides whether they constitute due diligence. 626
7. When a sheriff has taken property under attachment, which he afterwards sells, by agreement between the plaintiff and defendant in attachment, without an order of court, his sureties are not liable on their bond for his failure to pay over the money.—Governor, use &c., v. Perrine et al., 807
8. In an action against a sheriff and his sureties, for an alleged escape of a debtor in custody under bail process, an allegation in the declaration that the *capias* was "marked and endorsed for bail," is sufficient to show that he was required by the process placed in his hands to hold the defendant to bail.—Hutchisson et al. v. Governor, use &c., 809

SLAVES AND FREE NEGROES.

1. The question of freedom, as between master and slave, can only be tried in the manner prescribed by the statute, (Clay's Digest 542 § 19;) but when negroes are levied on by the sheriff, as the property of the defendant in execution, they may try the question of their freedom, as between him and them, by petition for *habeas corpus.*—Union Bank of Tenn. v. Benham, 143
2. A slave voluntarily manumitted is liable to his master's antecedent creditors; but a child born in a free State, of a manumitted woman, is free, although its mother, on her return to this State, is subject to the debts of her former owner. 143
3. Where the claimant of slaves institutes proceedings for their recovery under the act of Congress of February 12, 1793, as fugitives from his service, and obtains the certificate of the justices in his favor, as required by the act, the proceedings can only affect those who are arrested by the warrant of the justice and brought before him; and although the certificate declares that certain other persons, children of a woman who was arrested and remanded as a fugitive slave, are also slaves, and owe service to the claimant, yet, as to them, the sentence is a nullity.—Fields v. Walker et al., 155
4. In a suit for freedom under the statute of this State, the trial being had on one issue as to all the petitioners, evidence of what a deceased witness testified on a former proceeding under the act of Congress of 1793, to which only a portion of the petitioners were parties, is not admissible. 155
5. Children born in this State, of a negro woman who is a fugitive slave, cannot be regarded as fugitive slaves, or slaves which have escaped from service in another State, within the meaning of the constitution of the United States, and of the act of Congress of 1793. 155

STATUTES, CONSTRUCTION OF.

1. The act of 1850, (Pamphlet Acts 126 § 2,) which directed a sale of the remaining assets of the Planters' and Merchants' Bank of Mobile, does not repeal by implication the act of 1845, which authorized the appointment of trustees to settle its affairs, and gave them power to use all the remedies to which the Bank, while in existence, was entitled; and a sale pursuant to that act, of notes then in suit, does not affect the further prosecution of it for the benefit of the purchaser.—Jemison v. P. & M. Bank, 168
2. The Mississippi statute of 1840, (Hutchinson's Code 324, *et seq.*) which forbid the Banks of that State to "transfer by endorsement or otherwise any note, bill receivable, or other evidence of debt," is unconstitutional, being in violation of the section which declares that no State shall pass any law impairing the obligation of contracts.—(Constitution U. S., Art. 1, Sect. 10.) 168

SUMMARY JUDGMENTS.

1. In a summary proceeding under the statute, by a Bank whose charter has been forfeited, and her affairs placed in the hands of trustees for settlement and liquidation, the notice having been held defective on er-

ror, for the want of an averment that the suit was instituted by the direction and authority of the trustees, the court below to which the cause is remanded may permit an amendment of the notice by the addition of that averment.—Jemison v. P. & M. Bank, 168

2. The amendment may be made in such case by annexing the trustees' certificate to the notice, averring that the Bank, "by its trustees named in the certificate annexed hereto, appointed under the act therein specified, will move," &c. 168

3. Where the affairs of a Bank are by statute placed in the hands of trustees for settlement, after a judgment has been rendered on *quo warranto* against the Bank declaring its charter forfeited, the subsequent reversal of that judgment does not affect a suit previously instituted by the trustees against a debtor of the Bank, nor can he take advantage of that reversal to protect himself against the rendition of judgment. 168

4. The act of 1850, (Pamphlet Acts 126 § 2,) which directed a sale of the remaining assets of the Planters' and Merchants' Bank of Mobile, does not repeal by implication the act of 1845, which authorized the appointment of trustees to settle its affairs, and gave them power to use all the remedies to which the Bank while in existence, was entitled; and a sale pursuant to that act, of notes then in suit, does not affect the further prosecution of it for the benefit of the purchaser. 168

5. In a summary proceeding by notice and motion against a Bank debtor, if the proper certificate is appended to the notice, that the note is really and *bona fide* the property of the Bank, the certificate is proof of the jurisdictional fact to the end of the suit, although the note is sold or assigned before judgment. 168

6. The trustees of the Planters' and Merchants' Bank of Mobile, appointed under the act of 1845, were authorized to take individual notes to secure a balance due to the Bank from a suspended Bank of another State, and to institute suit thereon by the summary remedy of notice and motion. 168

7. In a summary proceeding under the act of 1848 or that of 1850, against a tax collector and his sureties, the principal is a necessary party to the notice; and if the notice shows on its face that he was dead before it issued, it is demurrable.—Governor v. Powell and Bradley, 579

8. In summary proceedings by notice and motion against Bank debtors, the notice serves the double purpose of a writ and declaration, and prevents the statute of limitations from creating a bar, although the motion for judgment is afterwards delayed.—Stanley v. Bank of Mobile, 652

9. To authorize a summary judgment against the sureties of an administrator, the record must show the judgment against the administrator, the bond by which the sureties have become liable, the issue of an execution on the judgment against the administrator, and its return "no property found."—Hanna, adm'r, v. Price et at., 826

SUPREME COURT.

See PROHIBITION,
ERRORS AND APPEALS,
BILLS OF EXCEPTIONS.

SURETIES.

1. A failure on the part of a creditor to present his claim to the administrator of the principal debtor within eighteen months after the grant of letters, does not discharge the sureties, nor affect his right to proceed against them.—Minter and Gayle v. Br. Bank at Mobile, 762
2. When a mortgage is assigned by the principal debtor to a trustee for the protection of his surety, with authority to collect the mortgage notes and pay the debt out of the proceeds, on default being made in its payment, the creditor is entitled to the benefit of the security.—Cullum et al. v. Br. Bank at Mobile, 797

TAX COLLECTORS.

1. In a summary proceeding under the act of 1848 or that of 1850, against a tax collector and his sureties, the principal is a necessary party to the notice; and if the notice shows on its face that he was dead before it issued, it is demurrable.—Governor v. Powell and Bradley, 579

TRESPASS AND TROVER.

1. If defendant continues in actual possession after a recovery and satisfaction in trespass *quare clausum fregit*, plaintiff cannot maintain a second action against him for a continuation of the trespass, unless he shows a title which would carry with it the constructive possession.—Segar v. Kirkley, 680
2. Where there has been a conversion of property owned by several tenants in common, they may all waive the tort and join in assumpsit, or each one may bring a separate action for his interest without joining the others.—Tankersley v. Childers et al., 781

TRIAL OF THE RIGHT OF PROPERTY.

See EVIDENCE 44, 56.

TRUSTS.

1. Where a debtor conveys by deed all his property, both real and personal, to a trustee, in trust that he will, first, make the grantor a reasonable allowance for the comfortable support and maintenance of his family, and the education of his children: secondly, that he will pay all the grantor's debts, and the debts incurred in the execution of the trust; and, thirdly, that he will then convey the legal title to the property undisposed of to the grantor's children; and delivers the deed, as also the possession of the property, to the trustee, who accepts the trust, the trusts in favor of the grantor's creditors and children become perfect, and cannot afterwards be divested or revoked by any act of the grantor or trustee. And in such case, a court of equity will enforce the trust, at the instance of the grantor's children; and if the bill allege that the trustee has paid all the debts, the creditors are not necessary parties to the bill.—Andrews et al. v. Hobson's Adm'r et al., 219
2. Where a trustee purchases at his own sale, the purchase is liable to be set aside, if the *cestuis que trust* make known their dissatisfaction within a reasonable time, and have never ratified or confirmed the sale, after being informed of every fact connected with it in the knowledge of the trustee necessary to enable them to form a correct judgment. 219

3. Where one tenant in common, having obtained a conveyance from his co-tenant for the purpose of mortgaging the entire estate, and bound himself to re-convey one half of the land after the mortgage is raised, rents out the premises and collects the rents, he becomes, as to these rents and profits, a trustee by implication for his co-tenant, and when the latter seeks an account of them, the statute of limitations of six years will bar him.—Tarleton v. Goldthwaite's Heirs and Adm'r, 346
4. Courts of equity grant relief against conveyances obtained by misrepresentation or mistake; and if the parties occupy a relation from which an unusual degree of confidence, affection or sense of duty naturally springs, the utmost degree of good faith is required from the party in whom the trust is reposed, and he must show that his contract is in every respect just, fair and equitable.—Boney et al. v. Hollingsworth et al., 690
5. The removal of a trustee from the State, without having executed the trust confided to him, gives the Court of Chancery authority to execute it.—Cullum et al. v. Br. Bank at Mobile, 797

VENDOR AND VENDEE.

1. A vendor who takes no independent security for the payment of the purchase money, has a lien on the lands for its payment, as against the vendee and all claiming under him with notice of the lien; and this principle equally applies to exchanges of lands, and whether the parties execute conveyances or bonds for titles only.—Burns v. Taylor et al., 255
2. When the only condition of a bond for title is that titles shall be made as soon as a patent is obtained from the Government, the presumption from its face is that the purchase money has been paid, and it is no notice to an assignee of an obligee that the purchase money is unpaid. 255
3. The fact that land is in the possession of a third person is sufficient to put a purchaser upon inquiry, and to preserve a lien against him if he purchases without inquiry. 255
4. If a person in possession of land, upon inquiry by one who is about to purchase it from another, relative to the title, advises him to purchase, and assures him that there will be no difficulty about the title if he does, and afterwards delivers up the possession to the purchaser's agent, his acts amount to an abandonment or waiver of a vendor's lien which he held against the person from whom the purchaser bought. 255
5. And although, when afterwards applied to by the purchaser for an assignment of a title bond held by him, he refuses to make the assignment, until assured by the purchaser that it will not impair his lien, and makes the assignment upon this understanding, this does not place him in any better or worse position, as his lien was already lost by his previous conduct. 255
6. When a vendor represents his title to be good, it is equivalent to saying that he has a perfect title to the entire tract, unaffected by any gaps in the chain of title, or any defect or incumbrance whatever.—Smith v. Robertson, 312
7. A court of equity will rescind a contract of sale at the instance of the

vendee, and restore to him the purchase money which he has paid, whenever the contract is tainted with false and fraudulent representations on the part of the vendor relative to the title; and for this purpose, the whole conduct of the vendor in relation to the matter may be looked to. 312

8. If the contract is made under a mutual mistake as to the vendor's title, the vendee is entitled to a rescission, if he seeks it within a reasonable time after the discovery of the mistake, and abandons the possession, delivering or offering to deliver it to the vendor. 312

9. The vendee's right to a rescission in such case does not depend on his payment or tender of the purchase money, nor upon the vendor's insolvency, but upon his own promptness in seeking a rescission. 312

10. A tender by the vendor of a deed signed by himself and wife, and attested by two witnesses, is sufficient; it is the duty of the vendee to have it probated, if he wishes it.—Carter v. Corley, use &c., 612

11. An outstanding right of dower, whether perfect or inchoate, is an incumbrance upon a title which renders it defective; and a vendee who has contracted for "good and lawful titles," may come into equity to have compensation for such dower claim out of the unpaid purchase money.—Thrasher and Mitchell v. Pinckard's Heirs and Adm'rs, 616

12. A vendee is entitled to recover damages of his vendor for a breach of an express warranty of title to a slave, upon proving the recovery of a judgment against his vendee by one having an adverse title, and of another judgment by his vendee against himself, and that defendant was notified of the pendency of both suits.—Harris v. Rowland's Adm'rs, 644

13. An offer to rescind by the vendor, not accepted by the vendee, has no legal effect whatever on the contract, unless the offer is based on the fraud or bad faith of the vendee. 644

14. Where a vendee, on being informed that an adverse title was set up to the property, examines that title, and expresses himself satisfied with his own, this does not deprive him of his right of action against his vendor on a breach of his warranty of title. 644

VENUE.

1. An order of court for a change of venue, which recites that, by consent of parties made in open court, it is agreed that the cause shall go to either one of two specified counties at the election of the plaintiff, is incomplete until the plaintiff has made his election between the counties named, and the court has acted on his election by ordering the papers in the cause to be transmitted by the clerk to the county so chosen.—Exparte Remson, 25

WILLS.

1. When the proponent of a will is the husband of one of the legatees, his declarations that the testator was of unsound mind when it was executed cannot be received to invalidate the will.—Walker v. Jones, 448

2. When one of the heirs at law appears and contests the validity of the will, he cannot be heard to assign for error that there were other resident heirs who were not duly notified and who did not appear. 448

3. An instrument purporting on its face to be a deed, acknowledged by the maker before a justice of the peace to have been signed and delivered as such on the day of its date, and conveying by present words of gift, in consideration of natural love and affection, to several of the maker's children, specific legacies of slaves and all the money and notes and household and kitchen furniture on hand at the time of his death, but reserving to him the right of ownership over the slaves until his death, at which time it is declared, "this deed shall take effect," held a will not a deed. 448

4. A testator bequeathed a slave to one of his daughters, by her maiden name, "*entirely* for her and her children," and gave others specific legacies of slaves with incumbrances on them: *Held*, that the word "entirely" did not exclude the marital rights of the husband, but had reference only to the quantity of the estate which the legatee took as compared with the others; that, if she was unmarried at the time the will took effect, she took a life estate only, with remainder to her children; but if she was then married and had children, she took an absolute estate jointly with them.—Furlow's Adm'r v. Merrell, 705

WITNESS.

1. A defendant, who is a formal party to a bill as husband of one of the heirs at law of an insolvent decedent, is a competent witness for his co-defendant, especially when he testifies against his own interest.—Burns v. Taylor et al., 255

2. The correctness of the rule questioned, which is laid down in Hohman's Heirs v. Bank of Norfolk, 12 Ala. 405, that where a defendant who appears from the face of the proceedings to have no interest makes a long and formal answer, setting up as a defence to the bill matters which do not properly concern him, and thereby subjecting himself to a liability for costs, he is rendered incompetent as a witness for another defendant. 255

3. In an action at law between the administrators of two estates concerning the title to slaves, a woman who was the widow of both of the decedents is an incompetent witness for the administrator of the estate which has the smaller number of distributees.—Lay's Ex'r v. Lawson's Adm'r. 377

4. When a witness who is shown to be incompetent on his *voir dire*, is nevertheless allowed to testify, facts proved by him on his examination in chief cannot be looked to for the purpose of curing the error. 377

5. When one partner takes a bond from his co-partner on the dissolution of the partnership, conditioned that the obligor shall pay all the debts of the firm, and the latter afterwards brings a suit at law, the obligee is an incompetent witness for the defendant to prove that a debt offered as a set-off "was due from said firm at the time of its dissolution, and that it was acknowledged to be due; also to prove the amount of the debt, and what it was for."—Hoyt, Ford & Robinson v. Murphy. 456

6. In an action against the owners of a steamboat to recover damages for the loss of a stage, occasioned by a collision between the steamboat and a ferry flat on board of which the stage was, the stage-driver, under

whose care and control the stage was at the time, is an incompetent witness for the plaintiff, without a release.—Otis & Jayne v. Thom, 469

7. In assumpsit to recover for lumber furnished by plaintiffs to defendant, defendant's agent by whom it was procured is a competent witness for plaintiffs; and evidence that he was indebted to defendant for money advanced on the building contract at the time he procured the lumber is irrelevant.—Ortez v. Jewett & Co., 662

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